SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No.

R. F. BASKIN, BY HIS GUARDIAN AD LITEM AND TRUSTEE, CATHERINE DUNN, PETITIONER,

vs.

INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA, KAISER COMPANY, INC., SHIPYARD NO. 3 AND HARTFORD ACCIDENT AND INDEMNITY COMPANY

ON PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT

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[fol. 1]

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT, DIVISION TWO

R. F. BASKIN, by his guardian ad litem and Trustee, Catherine Dunn, Petitioner,

v.

INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA, KAISER COMPANY, INC., SHIPYARD No. 3 and HARTFORD ACCIDENT & INDEMNITY COMPANY, Respondents

1st Civil No. 13,927

(Baskin v. Kaiser Co., et al., Com Cl. No. S.F. 108-330)

PRAECIPE FOR TRANSCRIPT OF RECORD—Filed May 7, 1949

To the Clerk of the District Court of Appeal, First Appellate District, Division Two:

Please prepare transcript of record for Writ of Certiorari containing the following, and transmit the same to the Clerk of the Supreme Court of the United States:

I. Proceedings in the Industrial Accident Commission
   A. Application for Adjustment of claim, p. 1.*
   B. Testimony of Transcript (complete), pp. 34-144.
   C. Report of Referee, pp. 294-299.
   D. Order of Dismissal, pp. 300-301.
   E. Report of Trial Referee on Applicants Petition for Rehearing, pp. 377-382.
   F. Order Denying Applicants Petition for Rehearing, p. 383.

II. Proceedings in District Court of Appeal
   A. Writ of Review
   B. Opinion of District Court of Appeal
   C. Order denying petition for rehearing

III. Proceedings in Supreme Court of California
   A. Order denying petition for hearing.

(S.) Stark & Champlin, Attorneys for Petitioner.

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*Page Reference is to Return to Writ of Review.

[fol. 2] STATE OF CALIFORNIA

DEPARTMENT OF INDUSTRIAL RELATIONS

INDUSTRIAL ACCIDENT COMMISSION

Los Angeles Office, 903 State Building, Los Angeles 12

San Francisco Office, 119 State Building, San Francisco 2

APPLICATION FOR ADJUSTMENT OF CLAIM No. 108330

Filed July 1, 1947

BASKIN, Applicant,

vs.

KAISER COMPANY, INC., SHIPYARD NUMBER THREE, Employer
HARTFORD ACCIDENT & INDEMNITY COMPANY,

Employer's Insurance Carrier

Applicant's address: 2663 Warren Road, Box 790A, Route No. 1, Memphis, Tennessee.

Employer's Address: Richmond, California.

Insurance carrier's address: 433 California Street, San Francisco, California.

1. Name of employee: Reuben Franklin Baskin.

Age when injured: 25.

Occupation at time of injury: While employed as a joiner, material crew.

Date of injury: December 10, 1945.

City, town or place where injury occurred: Richmond, California.

Name of employer: Kaiser Company, Inc., Shipyard No. 3, sustained injury arising out of and in the course of the employment, as follows:

Explain how injury was received: While helping to remove heavy planks from SS William Moultrie, I fell about 35 feet from hold to tank top.

State what parts of body were injured and subsequent results: Injuries to head, right eye and right forearm causing total permanent disability, both physically and mentally.

2. Name of Insurance Company: On said date said em-

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ployer's insurance carrier was Hartford Insurance Company.

3. Date could have resumed work: Injured left work on December 10, 1945, and disability continued to (total permanent disability). 19—.

4. Last payment of indemnity on June 6, 1947; last medical furnished by employer on February, 1947.

5. Give name and address of all doctors who treated or examined, and state by whom furnished; Medical or surgical examined, and state by whom furnished: Medical or surgical treatment has been rendered by Dr. John Card, Webster St., San Francisco; Dr. Kathryn Bradway, San Francisco; and Dr. A. Baritell, Dr. C. Cutting, and Dr. H. Donald Grant, Permanente Hosp.; Dr. O. W. Jones, 384 Post St., San Francisco; Dr. Maier J. Tuchler, 384 Post St., San Francisco.

6. Day, week or month: The employee's date of birth was Oct. 4, 1920 and his wages: $48.00 per week, working 5 days per week, 8 hours per day, plus any overtime.

To be used in death cases only

7. It is claimed that the deceased left the following named dependent. . :

NAME	AGE	RELATIONSHIP	ADDRESS
.....			
.....			
.....			
.....			
.....			

8. A question has arisen with respect to the liability of the employer or insurance carrier, and the reason for filing this claim is to establish that injury is compensable under California State Workmen's Compensation Act and to receive proper compensation award.

Wherefore, It is requested that a time and place be fixed for hearing and notice given, and that an order or award be made granting such relief as the party or parties may be entitled to.

Dated at Oakland, California, June 30, 1947.

Signature of applicant or applicants: (S.) R. F. Baskin.

Agent, or attorney for applicant: (S.) Fitzgerald, Abbott & Beardsley.

Address: 1516 Central Bank Building, Oakland.

[fol. 3] BEFORE THE INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA

R. F. BASKIN, by his guardian ad litem and trustee, Catherine Dunn, Applicant,

vs.

KAISER COMPANY, INC., SHIPYARD No. 3, and HARTFORD ACCIDENT & INDEMNITY COMPANY, Defendants

Claim No. 108-330

STATEMENT OF EVIDENCE

TRANSCRIPT OF TESTIMONY taken at a hearing in the above-entitled claim held before A. H. NELSON, REFEREE, at San Francisco, California, on December 23, 1947.

APPEARANCES:

Franklin C. Stark, Attorney-at-law, appearing for Stark & Champlin, representing the applicant.

R. P. Wisecarver, Attorney-at-law, representing the defendants.

Witnesses:	Page:
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John McManus	57
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Lois Nellis, Reporter.

[fol. 4] WARREN H. PILLSBURY, called as a witness in behalf of the defendants, being first duly sworn, testified as follows:

Referee: Q. You have no objection to putting Mr. Pillsbury on the stand at this time?

Mr. Stark: I have no objection whatsoever.

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Referee: Q. Your name is Warren H. Pillsbury, is it?
A. Yes.
Q. Your title, Mr. Pillsbury?
A. Deputy Commissioner, Bureau of Employees' Compensation, Federal Security Agency, formerly the U. S. Employees' Compensation Commission.
Q. Your address is what?
A. 630 Sansome Street, Appraisers' Building.

Referee: All right, Mr. Wisecarver, you may examine.

Mr. Wisecarver: Q. Mr. Pillsbury, you are the duly appointed and acting Federal Deputy Commissioner?
A. Yes.
Q. And as such, you administer the law under the Longshoremen's and Harbor Workers' Act?
A. Yes.
Q. And as such, have you received reports with reference to the injury of Reuben Baskin, the applicant in this case?
A. I have.
Q. And what are the nature of those reports, Mr. Pillsbury?
A. I have in the file the Employer's First Report of the Kaiser Company of December 17, 1945; a report from the Hartford Accident & Indemnity Company of December 26, [fol. 5] 1945, stating that it was starting workmen's compensation payments; a controversion notice from the Hartford Accident and Indemnity Company of December 18, 1945; and a large number of medical reports and some correspondence. You don't want me to go through and identify the reports, do you?
Q. Well, when were these medical reports filed with you, Mr. Pillsbury?
A. There is a report of Dr. Baritell received January 2, 1946; of Dr. Donald Grant, received December 21, 1945; of Dr. Baritell, (it's difficult to see the identity of the date stamp) dated January 27, 1947; Dr. John F. Card, dated January 21, 1947; Dr. Katherine Bradway, Ph.D., dated January 14, 1947; Dr. F. B. MacDonald, dated November 29, 1946; Dr. A. Baritell, dated October 19, 1946; Dr. A. Baritell, dated October 2, 1946; Dr. Baritell, dated June 3, 1946; Dr. Baritell, dated April 25, 1946; C. E. Rutledge, D.D.S. of April 17, 1946; Dr. Baritell of March 23, 1946; Dr. Baritell of March 11, 1946; Dr. Baritell of February

13, 1946; Dr. Baritell of February 6, 1946; Dr. Baritell of January 28, 1946, January 24, 1946, January 11, 1946 December 21, 1945; and report of Dr. H. Donald Grant of December 12, 1945.

Referee: Q. Those are all of the reports, are they, Mr. Pillsbury?

A. I beg pardon?

Q. Those are all of the reports, are they?

A. Yes, those are all that I have.

[fol. 6] Mr. Stark: May I ask, Mr. Wisecarver, may it be stipulated that these are all of the reports which the carrier has?

Mr. Wisecarver: I think that they substantially cover it. There may be one or two stray reports that are not in there, but that is substantially the reports.

Referee: Can't we have the stipulation, gentlemen, if it becomes necessary in the future, that photostatic copies may be made of the originals in the possession of Mr Pillsbury, if that is agreeable to him?

Mr. Pillsbury: Yes.

Referee: And that they may be filed in this case in lieu of the originals?

Mr. Stark: Well, I would like to ask whether the originals may not be here and now filed in this action.

Referee: They are in the possession of Mr. Pillsbury.

A. I can't surrender any portion of the U. S. Government's file. I can arrange to have photostatic copies made at the expense of any of the parties to the case, if you wish.

Mr. Stark: May I ask just a question at this point?

Referee: Certainly.

Mr. Stark: With whom were the medical reports left with you, Mr. Pillsbury?

A. They were left with me.

Q. By whom?

A. I assume by the insurance carrier. I don't recall positively, but most of them are addressed to the insurance company and would, therefore, have been brought

[fol. 7] by the insurance company's representative to me.

Mr. Wisecarver: If you will look at your memoranda, Mr. Pillsbury, I believe many of those latter ones were left with you on February 6, 1947, at which time you had a

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conference in your office with representatives of the applicant and representatives of the insurance company, particularly, Mr. Martin. Have you a notation of that?

A. I have a memoranda of a conference of February 6, 1947, held in my office, which was attended by Mrs. Raymond Dunn, stated to be a sister of Mr. Baskin, the claimant, and Mr. Martin of the Hartford. My best recollection is that Mr. Martin handed me the papers at that time.

Mr. Stark: Q. Were any of these medical papers given to you by the applicant or anyone representing him?

A. I will have to look through again. Let me correct my testimony. The first two reports I mentioned were received prior to the conference and probably came by mail.

Q. In other words, is it a correct statement that all of the medical was received by you from the carrier?

A. I will have to check the later reports again.

Referee: You are representing the applicant. I don't know whether he has had a previous attorney on the case or not.

Mr. Stark: No, he has not. I want to bring out further that there has never been anything pending before Mr. Pillsbury.

Referee: Anything pending? What do you mean?

Mr. Stark: That there has never been any claim of any [fol. 8] kind filed before Mr. Pillsbury. This material was simply gratuitously handed to the Federal agent.

Mr. Wisecarver: This isn't any gratuitous thing at all. All these cases are required to be reported to the Deputy Commissioner. They are required to file medical reports. They have done that.

Referee: Under the terms of the Longshoremen's Act?

A. Under the terms of the Longshoremen's Act and the rules of the Federal commission, and, furthermore, the latter reports that were filed in the group with Mr. Pillsbury were at the time of this conference, at which time there was taken up with Mr. Pillsbury, that which I shall now take up with Mr. Pillsbury by question, the question of a lump sum settlement of the remaining payments under the Federal agent, and that was a question that was pending before Mr. Pillsbury.

Mr. Stark: Whether or not they were properly submitted to him is the very question which is in issue.

Referee: At any rate, let's not argue the matter. I asked whether you are able to stipulate with reference to the substitution of the photostatic copies. I take it from your answer that you are not. Let counsel proceed with his interrogation.

Mr. Wisecarver: I would say with the reservation that I have heretofore made—I deny the jurisdiction of this Commission—I am perfectly willing to have them photostated, if you wish them.

[fol. 9] Mr. Stark: I am agreeable to the photostatic copies so long as they go in evidence.

Referee: I didn't make that suggestion. I said if it becomes necessary to have them in evidence, would you be agreeable that they be photostated and admitted.

Mr. Stark: Yes, except that it's my understanding that all of the issues are before you today, and I would like to have this medical in so that you could see it.

Mr. Wisecarver: I think that is a question for the referee to determine, whether or not he needs it. I am agreeable.

Referee: I think it would be a physical impossibility, if the photostats haven't been made. Mr. Pillsbury has indicated that he feels (and I think very properly so) that the documents that he has are properly in the possession of his office. I take it that he intends to take them with him. That is, I think, a proper attitude. So, there wouldn't be anything to come in. Are you demanding that the Commission issue a subpoena or in some way order the production of the originals in Mr. Pillsbury's possession?

Mr. Stark: No, sir. I am asking whether we couldn't stipulate that they be photostated so that you may have copies of them.

Referee: That is agreeable.

Mr. Wisecarver: That is agreeable. I am willing to do it, with the reservation I think the Commission hasn't jurisdiction.

[fol. 10] Mr. Stark: I have been furnished with copies of all of this medical. Now, if Mr. Wisecarver will stipulate that these are copies, I will turn them over to the referee.

Mr. Wisecarver: I haven't personally compared them, but I am sure they are. Do they constitute the full list that he read off? Did you check them as he read them?

Mr. Stark: They were furnished to me by you as copies of what Mr. Pillsbury had.

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Mr. Wisecarver: Well, I had no record of what Mr. Pillsbury had except I understood he had all the reports.

Referee: Have you any other questions of Mr. Pillsbury?

Mr. Wisecarver: Q. Mr. Pillsbury, what was the occasion of the conference on February 6, 1947?

Mr. Stark: I think I am going to properly object to going into a conversation or a conference which was had unless it's pertinent to the issues here this morning.

Mr. Wisecarver: It is pertinent to the issues. It shows this matter has been under the supervision of the Deputy Commissioner.

Mr. Stark: I don't think that is properly a matter of concern this morning.

Referee: I think it possibly might be.

A. I don't remember at whose request the conference was held. There was no notice setting the conference, but in some way the sister of Mr. Baskin and Mr. Martin called on me to discuss various problems with reference to the [fol. 11] case. I have my notes here of what was said at the conference. Do you wish me to review my notes?

Mr. Wisecarver: If you will.

Mr. Stark: I am going to object to what was said on the grounds that it's hearsay.

Referee: Is it necessary to go into details?

Mr. Wisecarver: I want to know what the subject was that was under consideration at that time.

Referee: Could you state that?

A. Yes. The matter that was finally got down to in the discussion was that the sister, Mrs. Dunn, inquired whether a lump sum could be granted to enable the sister or mother of the claimant to build a five thousand dollar home in which claimant and his mother could live and the mother could take care of him. And this was discussed for property just outside the city limits of the City of Memphis, Tennessee.

Q. That indicates the general nature of the purpose of the conference?

A. Yes. There was also considerable discussion as to the extent of disability and probable permanent disability.

Mr. Wisecarver: Q. Did you indicate your attitude on that, Mr. Pillsbury, at that time?

Mr. Stark: I am going to object to what his attitude might have been, Mr. Referee. I don't think that it is important this morning.

[fol. 12] Referee: He hasn't asked what it was. He asked whether he indicated his attitude.

Mr. Stark: All right. I will hold it.

A. I did.

Mr. Wisecarver: Q. What was that?

Mr. Stark: That I am going to object to on the g-ounds it's incompetent, irrelevant and immaterial.

Mr. Wisecarver: Showing that he is acting in the course of his province and duties as a Deputy Commissioner.

Mr. Stark: I don't think it's pertinent to the issues before the referee this morning.

Referee: I am inclined to think that the attitude of the Commissioner might not be material insofar as the issues in this case are concerned. As long as it is established that he had an official attitude, he was taking cognizance of the claim under the Longshoremen's Act.

Mr. Stark: I would like to ask him whether at any time Mr. Baskin ever filed a claim with you, Mr. Pillsbury, as head of the Federal agency?

A. No, no claim for compensation has ever been filed.

Referee: I will overrule the objection. You may answer the question, Mr. Pillsbury, as to whether you indicated your attitude.

A. Yes. I told the parties that I thought the showing was not good for a lump sum; that there was no assurance that he would have money to live on if his weekly payments [fol. 13] were terminated. I did not favor the proposal.

Q. That was in reference to any rights that he might have under the Longshoremen's Act?

A. Yes. There was an informal discussion of the possible lump sum of the commutation of the weekly payments under the Longshoremen's Act for total disability.

Referee: Anything else?

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Mr. Wisecarver: Q. Mr. Pillsbury, this was reported to you, was it, as an injury to a joiner who was injured on board a duly commissioned ship that was undergoing repairs?

A. I have before me the Employer's First Report of Injury. You recall, Mr. Wisecarver, that the statements made there are privileged, but if the employer waives the privilege I can state what the report states.

Mr. Wisecarver: We waive the privilege.

Mr. Stark: I object. Perfectly agreeable to the copy of that going in. I think it speaks for itself.

Referee: Do you have a copy of that, Mr. Wisecarver? I assume you do.

Mr. Stark: May I ask Mr. Pillsbury who furnished that to him?

A. The employer filed the report with me.

Q. Was that in any way agreed to by the applicant here?

A. Not personally by the applicant.

Mr. Wisecarver: This is a copy of it.

Mr. Stark: I am agreeable to this going in evidence without it in any way being an admission that any of the parts are true.

[fol. 14] Referee: Document on the form of the United States Employees' Compensation Commission, form URM US-202, dated December 17, 1945 received in evidence and marked Defendants' Exhibit A. Any other questions of Mr. Pillsbury?

Mr. Wisecarver: Q. On the information that is contained on that report, would you assume jurisdiction of the case, Mr. Pillsbury?

Mr. Stark: I am going to object to that. There has never been a claim filed before the Federal agency here involved. I think he is asking Mr. Pillsbury to prejudge the case.

Mr. Wisecarver: I say, on the information contained in that employer's report.

Mr. Stark: Why ask Mr. Pillsbury to guess what he would do.

Referee: Objection sustained.

Mr. Wisecarver: Q. On a case, Mr. Pillsbury, involving injury to a joiner working on a vessel being repaired

between voyages on navigable waters of the United States when he fell in the hold of a ship and was injured, would you assume jurisdiction of that case?

Mr. Stark: I am going to object to that. It assumes facts which haven't been established in this proceeding. It assumes that he was a joiner which we contest. It's a——

Referee: Objection sustained. I don't know of anybody that I would rather consult in reference to the question of jurisdiction probably than Mr. Pillsbury. He has had a great deal of experience, but I don't feel that the question [fol. 15] is a proper one at this time in the light of the present issues.

Mr. Wisecarver: Q. As long, Mr. Pillsbury, as compensation is being paid, is there any need for a formal filing of a claim before the Federal Deputy Commissioner so long as he is assured by reports that the compensation is being paid?

A. Not unless some other issue comes up as, for instance, concerning medical treatment or medical expense.

Q. Until some such issue as that occurs, there is no need for a so-called formal claim being filed?

A. That is correct.

Q. The reports provided for by the Longshoremen's Act and the rules of the Commission are sufficient for your purposes?

A. Yes.

Mr. Stark: I would like to ask Mr. Pillsbury whether there is anything in any compensation payments made by the carrier which earmarks them as having been paid under the Federal Longshoremen's Act, or were they simply compensation paid.

A. I think they were earmarked in a way. The insurance company's report of December 26, 1945 is on a Longshoremen's Act form and certifies to the commencement of compensation payments at the maximum rate and was filed in my office in the records of this case.

Mr. Wisecarver: Q. Are those on a form provided by you?

A. Yes.

Mr. Stark: Q. Was that a form which was agreed to by the applicant or anyone on his behalf?

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[fol. 16] Mr. Wisecarver: It's incompetent, irrelevant and immaterial. It's a form provided for by law to be reported by the insurance carrier.

Mr. Stark: That again assumes the—

Mr. Wisecarver: (Interrupting) Whether the employee likes it or not, it still is their duty.

Referee: I don't want any wrangling, counsel. You have interrupted and I have allowed you to interrupt the questioning by Mr. Wisecarver, but if it's going to end up in a wrangle, I will ask if you defer your questioning until Mr. Wisecarver has completed his questioning.

Mr. Stark: I am sorry.

Referee: Q. When you speak of the maximum rate, Mr. Pillsbury, what is that?

A. Twenty-five dollars a week.

Referee: Anything else?

Mr. Wisecarver: I think that is all.

Mr. Stark: May I ask you, Mr. Pillsbury, whether at any time, the applicant was represented by counsel before you?

A. He wasn't.

Referee: Who was Mr. Martin that you referred to?

A. Claims adjustor for the Hartford.

Mr. Wisecarver: This good-looking gentleman right here in the rear.

Mr. Stark: Q. And is Mr. Martin an adjustor for the carrier?

A. Adjustor or claims superintendent of the Hartford Accident and Indemnity Company.

[fol. 17] Q. May I ask you again, for the purpose of the record, whether at any time Mr. Baskin or anyone on behalf of him has ever filed a claim before you for compensation under the Longshoremen's and Harbor Workers' Act?

A. No claim has been filed by him or on his behalf.

Mr. Stark: Thank you very kindly.

Mr. Wisecarver: You mean by that, Mr. Pillsbury, no formal claim for a hearing?

A. Yes.

A. B. MARTIN, called as a witness in behalf of the defendants, having been duly sworn, testified as follows:

Mr. Martin: A. B. Martin.

Referee: Q. What is the position that you occupy, Mr. Martin, with the Hartford Accident & Indemnity Company?

A. Adjustor in the Claims Department.

Referee: All right, Mr. Wisecarver.

Mr. Wisecarver: Q. Mr. Martin, as such adjustor in charge, has the claim of Reuben Baskin come before you for consideration?

A. It has.

Q. That is with reference to the injury of December 10, 1945?

A. May I refer to my card—Yes.

Q. And did the Hartford have insurance coverage with the Kaiser Co., Inc. for their employees at that time covering the Longshoremen's and Harbor Workers' Act?

A. Yes.

Q. At that time was any action taken with reference to the [fol. 18] injuries to Mr. Baskin?

A. Yes.

Q. What was done?

A. A report was filed with us by the employer. Certain investigation was made at the Yard and the claim having been verified as in the course of employment, we commenced payment of compensation. Medical treatment had already been instituted immediately before we even were advised.

Q. And you have paid for the medical attention, have you?

A. It was paid not specifically as such, but paid under a general contract—all the shipyard.

Q. You paid for the medical and have you ever refused him any medical?

Referee: Are you speaking about Mr. Martin personally?

Mr. Wisecarver: The company?

A. No. Not to my knowledge. I must amend that.

Q. Have you paid him workmen's compensation under the Longshoremen's Act?

A. We have.

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Mr. Stark: I am going to object. It hasn't been proved that he was paying the compensation out of some particular account—as far as the record shows. He could have been paying it under either the State compensation act or the Longshoremen's and Harbor Workers' Act.

Referee: Q. Does your company keep separate records of disbursements with respect to amounts that are paid as compensation under the Workmen's Compensation Act [fol. 19] of the State of California as differentiated from those payments that are made under the Longshoremen's Act?

A. The money comes out of the same fund. We merely stamp files separately that come under the Federal Act so they can be paid at the Federal rate rather than the State rate.

Q. You do make some designation on your books?

A. That is correct.

Mr. Wisecarver: Q. Well, in your accounts it's marked the Longshoremen's Act payments, is it not?

A. Not in the accounting system. We draw on the same funds with the same drafts, but in our office setup to distinguish the type of payment, we separate the Federal from the State.

Q. You keep a record of Federal payments separate from the State payments in the final accounting, do you not?

A. By statistical symbol only.

Q. That is what I say.

A. For rating purposes, I believe.

Q. And do you make a report to the Federal Commissioner on their form of the payments made?

A. Yes.

Q. And did you in this case?

A. I assume so. The record would have to speak for that. I would have to refer to my file and give you the information. You have the file there.

Q. Mr. Pillsbury referred to those that are in his file on form No. U.S. 206, filed with the Deputy Commissioner under date of December 26, 1945. Is this the form?

[fol. 20] A. Yes, that is the form.

Q. And do you from time to time make a record of payments that are made in cases to him?

A. I believe the next record would be of termination of payments and would be made there if payments were terminated.

Referee: Q. Have they, in fact, been terminated in this case?

A. It's my recollection that they were at the time that these proceedings were filed, and a form, I believe, was filed with the Deputy Commissioner at that time.

Mr. Wisecarver: A controversion notice. But have they since started payments?

A. Payments were resumed a short time ago. Exactly, they were resumed in November of this year.

Q. What is the total amount paid?

A. Twenty-six hundred and seventy-five dollars.

Referee: Twenty-six hundred and seventy-five dollars?

A. Representing a hundred and seven weeks.

Q. Are the payments continuing?

A. Yes.

Q. What is the date to the last payment?

A. December 29, 1947.

Q. Those payments are being made at the rate of $25.00 a week, are they?

A. That is correct.

Referee: Anything else?

Mr. Stark: I have several questions. Mr. Martin, did [fol. 21] Hartford also carry the insurance for Kaiser on the State Workmen's Compensation Act?

A. Yes.

Q. And do you put on these files the stamp to which you referred, that is, either the Federal Act or the State Act, the stamp, in accordance with the recommendation of the company you are insuring?

A. That stamp is placed on depending on the facts that are submitted to us on the report of accident or any subsequent investigation.

Q. And were any facts submitted to you on behalf of the applicant here?

A. I would have to refer to my file. I believe the Form 202—

Referee: This is a copy of it.

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Mr. Wisecarver: While we are having a little intermission, I would like to withdraw that and have it photostated for the purpose of my records.

Referee: That is agreeable.

A. It appears from this it was reported that Reuben Baskin was injured on the S.S. WILLIAM MOULTRIE.

Mr. Stark: Q. Does it appear who reported those facts to you? That is the only thing I am trying to get at?

A. Kaiser Company, Inc. It's signed on the typewriter here. What individual completed it, I don't know.

Q. Was anything reported to you by Reuben Baskin? Do you have any form there which indicates that Reuben Baskin ever made any report to you or any attorney on behalf of him?

[fol. 22] A. No, I don't believe Reuben Baskin was conscious during that time.

Q. He was unconscious for about three weeks.

A. Sometime, yes.

Q. Now, these payments of $25.00 per week, is that the same payment which would have been made if you had reported it on the State Workmen's Compensation Act?

A. No.

Q. That is not the same payment?

A. No.

Q. The amount is different?

A. It's less, yes.

Q. And the payments which you refer to as having been resumed in November of this year, were they resumed after the preliminary hearing before the State industrial commission, if you know?

A. I don't know.

Mr. Stark: That is all.

Mr. Wisecarver: Q. Mr. Martin, you have made a further investigation besides that report of the employer, did you?

A. The file would indicate that an investigation was made by Mr. Belford.

Referee: Is he of your office?

A. He had a joint capacity. He was employed by the Yard and also made investigations for us.

Referee: Anything else?

Mr. Wisecarver: Q. And did you have statements there from any of the foremen?

A. The file has a statement here signed by Thomas Entwistle, joiner, assistant foreman.

[fol. 23] Mr. Stark: Well, Mr. Entwistle is here. We will be putting him on the stand.

A. Also a statement—the name appears to be Allen.

Referee: Anything else of Mr. Martin?

Mr. Wisecarver: I think that is all.

Referee: Are those all the witnesses you have to be put on out of order?

Mr. Wisecarver: I think that is all.

THOMAS ENTWISTLE, called as a witness in behalf of the applicant, being first duly sworn, testified as follows:

Mr. Stark: Q. What is your name, please?

A. Thomas Entwistle.

Referee: Q. Your address?

A. 2331 Mono Avenue, El Cerrito, California.

Mr. Stark: Q. And where do you work now, Mr. Entwistle?

A. United Engineering Company, Alameda.

Q. What is your position there?

A. Leaderman in charge of joiner materials.

Q. And during the recent war, Mr. Entwistle, did you have occasion to work for Kaiser Co., Inc. in shipyard No. 3 in Richmond?

A. I did.

Q. And what was your capacity there?

A. In charge of joining material.

Q. And for what period of time did you work for Kaiser?

[fol. 24] A. July, 1943 through, I think it was July, 1946.

Q. And this is in shipyard No. 3 at all times?

A. Yes.

Q. Did you as leaderman have a crew of men which included the applicant, Reuben Baskin?

A. I did.

Q. And for what period of time was Mr. Baskin a member of your crew?

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A. From the time that I started my job at Yard 3 until the time of the accident.

Q. Is it a correct statement then that from in about July in 1943 to and including December 10, 1945, Mr. Baskin was a member of your crew and under your direct supervision?

A. That is right.

Q. Calling your attention, Mr. Entwistle, to December 10, 1945, what happened on that day with respect to Mr. Baskin?

A. You want it from the start of the day or just as pertains to the accident?

Q. Well, start from the beginning of the day.

A. Well, in the beginning of the day I generally sent the crew out on various jobs that we had to clean up from the day before, and I had done that the morning of the accident, and I got instructions to send some men down to the Moultrie to move some planks out of the hold. I did send two men down and they came back and reported that they would have to have help seeing that the crane from the dock could not reach the ship and also that the ship itself did not have any steam up to use their winches. So [fol. 25] they took the hand line which is a rope used to hoist materials. And I told them I would send them some more men down. I did send two men. I met Reuben in berth two coming off a job he had just finished, and the fact that I had nothing else for him to do at that time, I sent him along, told him where the men were and to go down and give them a hand.

Q. Now, what kind of a job had Reuben been working on up to that time that morning?

Mr. Wisecarver: We object, incompetent, irrelevant and immaterial, what he may have been doing.

Referee: Overruled.

A. Well, I don't understand.

Referee: Q. What kind of work had he been doing?

A. He had been handling joining materials, sir.

Mr. Stark: Q. And where was he doing it?

A. Well, he was doing it on the ship in berth two.

Q. That was new construction?

A. New construction vessel, yes.

Q. And the two men that you sent over to the Moultrie at first, were either of those Baskin?

A. No, sir.

Q. And the two men that you sent over subsequently when aid became necessary, were either of those Baskin?

A. No.

Q. Now, these planks which had to be moved on the Moultrie, how had they gotten aboard the Moultrie, if you know?

A. They were placed aboard, if I remember correctly, to replace some broken planks, or worn-out, on the bottom of [fol. 26] the hold, which was covered by a work order and which I had requisitioned to go aboard the ship. The men working in the hold had finished their job and had these planks as surplus, which were required in the forward hold, No. 4, and I was asked to send men down to take them out of hold 5 and place them in hold 4, for the regular joiner installation crew to take care of.

Q. Now, were these men that you sent supposed to install the planks in the ship?

A. No.

Q. Were they supposed to attach them in any way to the ship?

A. No, sir.

Q. Were they supposed to affix anything on the ship?

A. No.

Q. Is it correct that their only purpose was to move the planks from one place in the ship to another?

Mr. Wisecarver: I object to this as leading.

Mr. Stark: I think perhaps counsel is right. I will rephrase it and ask Mr. Entwhistle what their purpose was?

A. The crew that I was placed in charge of, their duties were to——

Q. On this particular occasion.

A. That is right. Well, the case was the same in all cases, as far as that goes. Their job was to handle the materials that the joiners, the installation crews, would require to do their work. And it was our job to get the material from the warehouse or the various stockyards to the ship and in place for the men to erect.

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Q. Now, about what time of the day was it on December 10
[fol. 27] that you sent Mr. Baskin to the Moultrie?
A. Oh, somewhere between, around nine o'clock.

Referee: In the morning?
A. Yes, sir.

Mr. Stark: Q. And about how long after you had sent the other men to the Moultrie was it that you sent Mr. Baskin?
A. Oh, maybe ten, fifteen minutes.
Q. And about how long after you sent Mr. Baskin was it that you heard that Mr. Baskin—that you knew that Mr. Baskin had been injured?
A. Roughly, between twenty and thirty minutes. I am not too sure about that.
Q. How long was the job for which you sent the men to the Moultrie estimated to take?
A. That is when I sent Reuben down or originally when I sent the first two?
Q. When you sent the first two men down.
A. Oh, if the mechanical equipment had been available to lift the planks, approximately five or six minutes.
Q. To do the entire job?
A. Yes.
Q. Now, at the point where you sent the additional men down, how long did you estimate that it would take?
A. Oh, somewheres in the neighborhood of forty-five minutes.
Q. Mr. Entwistle, was this job of moving the planks from one place to another a job which would normally have been done by the crane?
A. Correct.
Q. And when you refer to crane, where would that crane have been located?
[fol. 28] A. Well, when I refer to crane, it's generally located on the dock or alongside of the vessel being worked on.
Q. In other words, normally a crane on the dock would have moved these planks from one place to the other?
A. Yes.
Q. And why didn't the crane do it that morning?
A. Because the Moultrie was tied up third out, in berth four. The dock crane itself, the boom wasn't long enough

to reach the deck, rather the hold, in which the planks were to be lifted from and may I state our methods previous to that?

Referee: Do you want that?

Mr. Stark: I don't believe so.

Mr. Wisecarver: We object. That is incompetent, irrelevant and immaterial to the proceedings.

Referee: Had you completed your answer?

A. O.K.

Referee: All right. Let's have the question.

A. The men I originally sent down checked on the ship to see if they couldn't use the ship's winches to hoist the material from the hold to thereby save time. The ship had no steam. Therefore, they came back for the additional help.

Mr. Stark: Q. And the ship to which you are referring as having no steam was the Moultrie?

A. That is correct.

Q. Now, have you ever sent Mr. Baskin aboard the Moultrie prior to this time?

A. No.

Q. Do you know how long the Moultrie had been in port?

[fol. 29] A. I can't say for sure that I did.

Q. Do you know whether she had any crew on her?

A. No, I can't say that for sure. I would be assuming, if I did.

Referee: How's that?

A. I can't say for sure. I would be assuming, if I did.

Mr. Stark: Q. Did you normally and customarily send Baskin aboard commissioned vessels?

A. No, not any more than I could help.

Q. Why was that?

Mr. Wisecarver: Just a minute. We object, incompetent, irrelevant and immaterial. Has nothing to do with the issue here. If he is actually working on admiralty work, it's admiralty jurisdiction irrespective of why he would or would not send him at other times.

Mr. Stark: The cases show very clearly, Mr. Referee, that a very important point is the applicant's general contract of employment and we intend to show that his general contract of employment was a land contract; that he was

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only temporarily, casually and very unusually aboard a commissioned vessel.

Referee: The question that you ask then, I take it, is in the furtherance of the position that you take on that matter, as a matter of law?

Mr. Wisecarver: Well, the United States Supreme Court has spoken just point blank——

[fol. 30] Referee: Objection overruled.

Mr. Wisecarver: —in repeated decisions.

A. Not any more than I could help.

Mr. Stark: Q. On how many occasions apart from the Moultrie to the best of your recollection did you ever send Baskin aboard a commissioned vessel?

A. To the best of my recollection, two or three.

Q. And on those two or three occasions, how long would he be there?

A. Can I put the answer in reference to the balance of the crew, whether it was Reuben or not?

Q. I would like to have you answer the question with respect to Reuben to the best of your recollection.

A. Not more than a half hour or an hour at the most.

Q. And this covers the period of time that Reuben was under your supervision; is that correct?

A. That is correct.

Q. Now, what was the general nature of Reuben's work under your supervision?

A. His job was to at times go to the warehouse, bring material out to the dock, and if it was too much for him to handle alone, to get help from the rest of the crew who were generally on the dock or on the ship—get it aboard the ship and place it in the position suggested on the requisition where the material was needed.

Q. When you refer to "ship" are you talking about new vessels or old vessels?

[fol. 31] A. Well, I am referring to new construction vessels, and in the case of this on the Moultrie, in the old work.

Q. In other words, on any occasions other than the two or three to which you have referred when Mr. Baskin was aboard old vessels, and the Moultrie occasion—on all other occasions when he was going aboard vessels, they were new construction vessels; is that correct?

A. That is correct.

Q. Now, what was Mr. Baskin's classification?
A. Payroll classification?
Q. Yes, that first.
A. Joiner.
Q. Did he perform the work of a joiner?

Mr. Wisecarver: Just a minute. We object—incompetent, irrelevant, immaterial. That was his classification.

Referee: I think it might be well to have the preliminary question as to what the work of a joiner is, as the witness understands it. I have no doubt he would understand it, being the foreman of the joiners.

Mr. Stark: All right.

Referee: Q. What does a joiner do?
A. A joiner on a ship does the interior work of installing bulkheads, ceilings and finished trim of quarters.
Q. Essentially a carpenter?
A. Beg pardon?
Q. Is he essentially a carpenter or metal worker?
A. He is a bit of both at times. On wood vessel, he would be a carpenter and a joiner does handle—where metal is substituted for wood, he does handle metal.

[fol. 32] Mr. Stark: Q. Now, was it Mr. Baskin's job to do the things that you have described as belonging to a joiner?
A. No, sir.
Q. What did he do?
A. He handled the materials that the joiners installed aboard the ship; that is, he took them from the dock to the ship and placed them in their required position.
Q. What was he called in doing that?
A. He was called a material man.
Q. And is it correct that the reason why he was carried as a joiner was because there wasn't any classification called material man?

Mr. Wisecarver: Just a minute. We object to that as leading.

Mr. Stark: Well, I will rephrase that. I think counsel is right. Q. Why was he carried as a joiner if, in fact, he was a material man?
A. Well——

Referee: If you know.
Mr. Stark: If you know.

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A. I do know. It's rather difficult to answer. He was carried as a joiner on the payroll. So far as that goes, so was I. But as a rule the men given to me to put to work were men who weren't competent to do the actual installation of their craft suitably enough to be allowed to use the tools. Reuben was one of them.

Q. Now, you have referred to carrying materials from warehouses. What warehouses were those?

[fol. 33] A. Well, as far as the carrying of material, that would be only from the general warehouse where general materials were stored or from what we refer to as the "hopeman" warehouse where the prefabricated materials for the vessels were stored.

Q. And where were those materials taken from the warehouse?

A. From the warehouse, taken to the dock and placed aboard the ship that required it.

Q. And these are new construction vessels to which you are referring except on the two or three occasions that we earlier talked about?

A. That is right.

Q. Was a truck used in connection with getting these materials?

A. In most all cases, yes.

Q. What would Reuben do in that connection?

A. Well, on the few times that I permitted him to go on the truck to the warehouse, he would just go over to the warehouse and pick up materials that had already been ordered and see that the driver of the truck got to the right place alongside of the ship on which the materials were required.

Referee: Q. You say that was only on the few occasions when you allowed it? Didn't he usually accompany the truck then?

A. No, sir. I used some of my other crew—more capable of thinking for themselves.

Mr. Stark: Q. And why did you not allow him to accompany the truck?

A. Well, Reuben was too slow on the pickup as far as [fol. 34] that goes. He was mentally slow. It took too much time to impress on him just exactly what you wanted him to do. I couldn't give him a requisition to go to the ware-

house and expect that he would bring the material out and get it exactly where that requisition called for unless previously instructed.

Q. And did you, for that reason, confine Reuben to certain tasks?

Mr. Wisecarver: Just a minute, again leading and suggestive—object to that.

Mr. Stark: I don't believe that is leading and suggestive.

Referee: Overruled.

A. Yes, for my own protection, because if things went wrong, naturally, I was called on the carpet. While Reuben was one of the best workers if he was placed on a job and understood what he was to do, he couldn't be allowed to go by himself and do something, without somebody being alongside to keep his mind on his work to finish it.

Q. What kind of work did you confine him to, normally and customarily?

A. I confined him——

Mr. Wisecarver: It's understood that we are objection to all this line of testimony as being incompetent, irrelevant and immaterial to the issues.

Referee: Overruled.

A. I confined him to work that he had done from the time [fol. 35] he was there in handling these materials, because from ship to ship he got familiar with them and familiar with the layout of the ship and could be expected to know a little bit about the materials he was to handle.

Q. Now, are you referring to new construction ships?

A. Yes.

Referee: What kind of ships were they building?

A. C-4's.

Mr. Stark: And were those ships upon which Reuben was normally and customarily working?

A. From the time I assumed charge of the crew in which he was in, yes.

Q. To and including the date of the accident?

A. Correct, with the exception of the times I noted.

Q. Yes. Now, did Mr. Baskin ever work under any other leaderman except you during any time from about July 1943 to and including December 10, 1945?

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A. Only once that I can recollect, when one morning I had nothing for the crew to do and I loaned him out to various foremen on the ship to keep busy for—I think it was three or four hours, until my materials started arriving and I could use them again.

Q. And do you know what kind of work Mr. Baskin was doing on this one occasion when he was not under your direct supervision?

A. Yes. He was handling the insulation up on the ship in berth two for a Mr. McKey.

[fol. 36] Q. Was that new construction vessel?

A. New construction.

Q. Now, had any instructions been issued to you by any superior with respect to the type of work which Mr. Baskin was to do?

A. Yes, as far as the—may I explain myself a little bit?

Referee: Surely, if it is necessary to explain in order to answer the question completely.

A. When this repair program came up, Mr. McManus, being my superintendent, naturally had the men who were going to be responsible for work on the repair vessels instructed as to the difference between the two types of work. I was called in and told to keep down my time on repair as much as possible. It not only meant more money charged against the ship, but my crew, being unskilled, the skilled joiners objected to the material crew getting too much of the so-called "gravy." And Mr. McManus asked me if I intended using Reuben. I told him not unless I had to, because the jobs that they would generally ask me to do on the repair vessels as far as the materials was concerned was spot jobs where a few things had to be moved here, moved there, and it didn't consume too much time; whereas, if I sent Reuben, he is liable to get lost.

Mr. Stark: Q. And were instructions issued at that time that Reuben was not to do that type of work?

A. He was not to do that type of work unless I had nothing else for him to do, rather than let him hang around, be criticized.

[fol. 37] Q. And when repair jobs came up which required somebody to go on ship, did you send other members other than Baskin?

A. Yes.

Mr. Wisecarver: We object, incompetent, irrelevant and leading.

Referee: Overruled.

A. Yes, I did, in every case where—as I say, unless it was necessary. I didn't send Reuben by himself.

Mr. Stark: Q. So that even on the two or three occasions when he was aboard an old vessel, he was accompanied by some one?

A. Oh, yes.

Q. Now, you had two rates of pay; is that correct?

A. Myself?

Q. No, the men working in your crew.

A. Yes, they did.

Q. And what were those rates of pay?

A. On the new construction vessels, $1.20 an hour; on repair work, $1.34.

Q. And what caused the difference, if you know?

Mr. Wisecarver: Just a minute. It's incompetent, irrelevant and immaterial—what the rate of pay is.

Referee: Is that material as to what caused the difference in the rate?

Mr. Stark: I would like to establish, if you please, what was the reason for the difference in the rate of pay in order to show that it was nothing that had anything to do with jurisdiction.

Referee: Overruled.

[fol. 38] Mr. Wisecarver: It was a question of arrangement with the unions.

Mr. Stark: Well, if you are going to testify.

Referee: Objection overruled.

Mr. Wisecarver: It has no relevancy to the issue here of who had jurisdiction of this case.

Mr. Stark: I think that is correct.

Referee: Q. What was the reason?

A. That was as far as Kaiser Company—I only know as far as Kaiser Company is concerned.

Q. Yes.

A. As far as Kaiser Company was concerned, they had a week-to-week arrangement with the unions whereby the working conditions and the pay scales were to be the same as paid and worked under in yards that customarily did

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repair work, allowing the fourteen cents extra per hour for work performed.

Mr. Stark: Q. Now, Reuben occasionally received the repair rate, if you know, is that correct?

A. Yes.

Q. And when one of your crew men received the repair rate, did that mean that he had done repair work aboard an old ship?

A. Not necessarily.

Q. In other words, were your crew men, including Reuben, paid the repair rate for doing work other than on old vessels?

A. Yes, they could be handling materials that was destined to go aboard repair ships and I would be forced to [fol. 39] give them the repair rate while they were handling that to the ship as well as on the ship.

Q. Was the work in the repair ships being handled on the time and materials basis, if you know?

A. I don't know that.

Q. Was it your practice to charge anything which a man did that was in any way related to the repair ship the repair rate?

A. I was supposed to.

Q. And you did?

A. I did.

Q. Is it correct then that if Mr. Baskin moved material from the warehouse to the material shop which was ultimately to go aboard a repair ship, he would be paid the repair rate for that time?

A. I would have to.

Q. Is it true if he moved materials from either of these warehouses to which we have referred to the dock, which material was ultimately to go aboard the repair ship that you would——

A. I would have to give him the repair rate.

Q. Is it true that if he received furniture or materials from the dock which had come from an old ship and which were to go to the carpenter shop to be repaired that he would receive the repair rate for that?

A. He would.

Q. And did Mr. Baskin perform these functions which I have just made reference to?

A. He probably did from time to time.

Q. And on those occasions he would have been paid the repair rate?

A. Yes.

[fol. 40] Q. But on those occasions he would not have been aboard an old vessel?

A. No, not necessarily, he wouldn't have been aboard an old vessel.

Q. Did members of your crew seek repair work?

A. Oh, yes.

Q. And why was that?

A. Difference in the rate.

Q. Did Baskin seek repair work?

A. No.

Q. And was anything said in that connection, or do you know why?

A. By who?

Q. By Baskin. Or do you know of your own knowledge why Baskin did not seek repair work?

Mr. Wisecarver: We object to that, incompetent, irrelevant, immaterial to any issue.

Mr. Stark: Perhaps I should rephrase it. Was anything said to you, Mr. Entwistle, which would cause you to know why Mr. Baskin did not seek repair work as did other members of your crew?

A. He must have talked to some of the other boys in the crew. Now, what I heard from them is only hearsay. Shall I tell it?

Mr. Wisecarver: We object to the answer and ask that it be stricken as not only a conclusion——

Referee: Is that the only source of your information, what other men told you concerning Baskin's attitude?

A. Yes, he never spoke to me directly.

[fol. 41] Mr. Wisecarver: We ask it be stricken.

Referee: It hasn't been answered; hasn't been asked, in fact. He answered the question that all he knows about Baskin's attitude is what other workmen told him.

Mr. Stark: Q. But it is true that Baskin did not come out actively seeking repair work as did the other members of the crew?

A. No, sir.

Q. That is true?

A. That is true, yes. Excuse me.

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Q. Now, calling your attention to V-J Day, August 13, 1945, were there any ships which were still being built at Kaiser Shipyard No. 3?

A. Yes.

Q. And do you know what hulls were still being worked on at that time?

A. The last five ships under the new construction program—hulls 46, 47, 48, 49 and 50.

Q. And did Reuben work on these hulls after V-J Day to and including December 10, 1945?

A. Yes.

Q. Was there any discussion which you had with anyone after V-J Day and prior to December 10, 1945 in which Mr. Baskin was the subject of discussion?

Mr. Wisecarver: Just a minute. Read the question. (The last question was read back by the reporter).

Mr. Wisecarver: We object as incompetent, irrelevant, and immaterial, although it's preliminary.

Referee: Obviously, a preliminary question.

[fol. 42] Mr. Wisecarver: But it's immaterial.

Referee: It isn't evident what the materiality of it is.

Mr. Stark: Well, I intend to show an instruction which was issued with respect to Baskin and his work on new construction after V-J Day.

Referee: Overruled.

Mr. Wisecarver: It has nothing to do with it if, in fact, he was working in repair on an ocean-going vessel.

Referee: Overruled. Did you have any discussion with anyone after V-J Day in reference to Baskin?

A. Well, I did with Mr. McManus, my superintendent.

Referee: Let's have the question.

Mr. Stark: Q. And what was the discussion, please?

Mr. Wisecarver: The same objection.

Referee: Overruled.

Mr. Stark: You may answer.

A. The fact that we only had the five ships, Mr. McManus was determining from the various foremen, because of the extensive repair program that had been talked about in the yard coming up after the five new vessels were completed, who in my crew would I keep if I had to lay off anybody at the end of the new construction program. I told him that under no conditions if I was going to be held accountable

for the repair materials under the same conditions I was on the new construction—under no conditions could I use Reuben.

[fol. 43] Q. And was it understood at that time when the new construction program was over, Reuben would have to be discharged?

A. That is right.

Referee: Q. This conversation, I take it, was before Reuben got hurt?

A. Oh, yes. It was in the early part of December.

Mr. Stark: Q. Is it correct it was after V-J Day and prior to December 10, to your best knowledge?

A. Yes.

Mr. Wisecarver: We ask it be stricken, incompetent, irrelevent and not responsive to any issue in the case.

Referee: Motion denied.

Mr. Stark: Q. Mr. Entwistle, is it correct that in order for Reuben to have gone aboard an old ship, he would have had to have passes?

A. Yes, that was a rule of the Yard.

Q. That did not apply with respect to new ships?

A. No.

Q. And did you have charge of issuing those passes to the members of your crew?

A. To members of my crew, yes.

Mr. Stark: I think that is all.

Referee: Q. How long are you going to take on cross-examination, Mr. Wisecarver? Would you be able to estimate it?

Mr. Wisecarver: I don't know.

(At this time a short recess was taken).

Referee: Had you finished the direct examination?

Mr. Stark: Yes, sir, I had.

[fol. 44] Referee: Mr. Wisecarver.

Mr. Wisecarver: Q. Mr. Entwistle, you had men working under you both on so-called new construction and also on repair work for ocean-going vessels already commissioned, did you not?

A. You mean at the same time?

Q. Yes.

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A. Not as a general rule, sir.

Q. But didn't you at different times?

A. Oh, yes, I had to send them from the new construction to the repair ships. I had no separate repair crew.

Q. As a matter of fact, the way that the crews were made up for doing repair work when it came into the yard was to designate either certain gangs or certain men to go on board the ship and do the work, wasn't it?

A. Not as regards myself, sir. We had no special ship to work on. All I did was when I had requests from the foreman working on the repair to have some work done to pick out a man or two men and send them over and do it.

Q. That is what I say. You did, when they needed men on board ship to do repair work, they asked you to send men, did they not?

A. That is right.

Q. You would pick men to go?

A. That is right.

Q. And you would either send a gang or send individual men?

A. That is right.

Q. And on the morning of December 10 you received a statement or order to send over some men?

A. Yes.

Q. And you did send over some men?

A. Yes.

[fol. 45] Q. And among the men that were sent over was Mr. Baskin?

A. Yes.

Q. And he was one of what constituted a gang of five?

A. At *his* particular time, yes. One more man went over later.

Q. I see. At the time he was there, there was a gang of five?

A. Yes, sir.

Q. Now, that was the shifting of the materials that were being used in the repair of the ship from one hold to another, was it?

A. That is correct.

Q. And all of this material was being used in the repair of the ship—that is what it was on board for?

A. Yes, sir.

Q. The work on the steamer Moultrie was repair work and not new construction?

A. That is right.

Referee: Q. Do you recall how long the Moultrie had been lying alongside for the purpose of repair?

A. I don't know, sir. That wasn't a part of my job to keep up with the different ships in the yard.

Q. Had you had any occasion to do any repair work or to send any of your gangs to do repair on the Moultrie up to this time?

A. No, sir, not that I recollect.

Mr. Wisecarver: Q. You might have and not recollect it at this time?

A. Pardon?

Q. I say, you might have sent men to the Moultrie and not recollect it at this late day?

[fol. 46] A. In the case of the material in question—originally, before it went aboard, the practice was to send the truck down and when the crane was available to send a man over to tell the riggers where to put it and forget about it. The men aboard the ship would install it, handle it from there on.

Q. Baskin was rated as journeyman joiner, wasn't he?

A. Yes, sir, as far as personnel goes.

Q. And the duty of a journeyman joiner is the handling of planking and of metals on board ship?

A. How do you mean that, sir?

Q. Well, I say, that is the duty of a joiner?

A. They erect it, but as a general rule they don't move it from spot to spot.

Q. You mean they have helpers with them that move—help them move the materials?

A. The material crew or the helpers—whatever you want to call them. They do the lifting, moving it from place to place. The joiner himself installing it doesn't touch it.

Q. But it's all part of the job of repairing the ship, isn't it, and it's done on board ship?

A. Yes.

Q. And it's necessary to move this material from one place to another on a ship as it's being used in the repair of the ship?

A. In a lot of cases, yes.

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Q. Who is it that actually fastens the material to the ship?

A. Well, the joiners.

[fol. 47] Q. Well, the joiner does that, doesn't he?

A. Yes, the men assigned to do that job.

Q. And any time that Baskin was assigned to do any work on the ship of a repair nature he would be entitled to be rated as a repair man doing repair work on your payroll?

A. Yes, I had to.

Q. The handling of this material from one place to another on board the ship for its immediate use in repair of the ship was a necessary part of that repair operation?

A. Oh, yes.

Q. And that was the work that you sent Mr. Baskin with the other members of that gang down there to do?

A. Uh huh.

Q. Your answer is, yes?

A. Yes.

Q. And he would be entitled by working on that ship to be paid at the rate of $1.34 an hour?

A. That is right.

Q. As repair work. Now, you stated that you had sent him previously on repair work some two or three times?

A. Actually aboard the vessels, to the best of my recollection.

Q. Yes. And as a matter of fact, you had sent him more than that, hadn't you?

A. I beg pardon?

Q. Hadn't you sent him more than two or three times?

A. Not to my knowledge.

Q. Do you remember what he was doing on the 6th of December—this happened on the 10th—do you remember what he was doing on the 6th of December?

A. He could have been doing any one of a hundred [fol. 48] different things, sir. I couldn't say for sure.

Referee: You can't remember?

Mr. Wisecarver: Well, if the payroll shows that he worked eight hours at the repair rate, would you know what that eight hours was for?

A. Probably handling repair materials. That is all I can say.

Q. Would that necessitate taking them on board ship?

A. It might and it might not. I don't know.

Q. He may have been working on board ship so far as you know the full eight hours, if the payroll shows that?

A. I don't think so, sir; however, I don't want to be specific on that. He never went aboard unless I sent him.

Q. You are familiar, are you, that he was given eight hours credit under repair work on the 6th of December?

A. I don't have any records myself.

Q. You haven't any recollection of it?

A. Pardon?

Q. You haven't any recollection of it?

A. Sir, I can't say. It's quite possible. I don't know. You have got the records there; I don't.

Q. And on the 4th of December, do you know what he was doing on that day?

A. No.

Q. And if the payroll records show that he worked four hours on repair, do you know whether it was on board the ship or not?

A. As I said before—I am not trying to hedge or anything—to the best of my knowledge, I don't. Reuben did [fol. 49] not go aboard unless I sent him with a pass, and I avoided that wherever possible.

Referee: Q. Were those passes kept after they had been used in the custody of the company? Were they returned to the company and kept on file or not?

A. Different colored passes were issued every day, sir.

Q. They would be returned at the completion of the task to you?

A. To me because—may I explain why?

Q. Yes.

A. Because another job may come up later in the day where I would need the passes to give to some of the men; therefore, as soon as they completed the job, they gave me the passes back again.

Q. This was just a single pass that would be used repeatedly?

A. During one day.

Q. During one day's time?

A. Yes. You couldn't use the pass.

Q. It might be used by more than one man to go aboard ship?

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A. Yes, sir. Not at the same time, but later in the day—different times.

Mr. Wisecarver: Q. And do you remember on November 16 what he was doing when he was given payroll credit of two and a half hours for repair work? Do you know what ship that had to do with?

A. No, sir.

Q. And on November 8 when he was given a payroll credit of four hours for repair work, do you know about that?

[fol. 50] A. No, sir.

Referee: Can't you ask him a general question, whether he would be able to testify to any of the dates indicated?

Mr. Wisecarver: Well, I will just ask the general question then. Can you tell us at all what he was doing when he was given the payroll credit of four hours on October 1, 1945; four hours on December 12, 1945; four hours—that should be October 12—correct that; four hours on October 15, 1945; an hour and a half on October 19, 1945; six hours and a half on October 25, 1945; six hours on November 6, 1945; four hours on November 8, 1945; two and a half hours on November 16, 1945;—now, on any of those dates do you know what ship he was working on?

A. Not having my foreman's time book available, I couldn't tell you, sir.

Referee: Q. Would your foreman's book enable you to answer the question?

A. It would. That was left at Yard 3—probably destroyed after I got through their employment.

Mr. Stark: I would like to make it clear that I understand your question to be not what ship he was working on, but what ship in connection with. If you are asking him whether that work was on a ship, I am going to object as assuming a fact not in evidence. In fact, the exact opposite—

Mr. Wisecarver: You can cross-examine him if you wish [fol. 51] to on that question. But so far as any of these occasions that I have mentioned are concerned, you do not know that he wasn't working on ships on those occasions, at least, part of the time?

A. I couldn't say as to each day, no.

Q. Now, there were various other men in your gangs whom you sent just rarely on board the ship for repair?

A. May I put it this way? I had four men in my crew who—let's see—I had three men in my crew that I gave repair work to more consistently than I did the others.

Q. But when you sent others with them, they were on the same basis on the ship as they were?

A. Yes.

Q. It was just a question of the size of the crew?

A. Yes.

Referee: Q. The question originally was whether there were other men that you only rarely sent on ships, whether there were men other than Reuben?

A. Cotton and Johnson might come under that classification.

Mr. Wisecarver: Q. There were two other men that you sent just rarely, was it?

A. Yes.

Q. But, I say, with reference to Cotton and Johnson and Baskin, when you sent them with the men that you more regularly sent, while they were on the ship, they were working as a part of the crew the same as the regular ones?

A. In regard to materials, yes.

Q. And each and every one of those six men that you have mentioned took the status of repairmen on board an [fol. 52] ocean-going ship when they were on board a ship?

Mr. Stark: I am going to object unless it's established what is meant by repairmen. They were being paid the repair rate, but let's establish whether that is what you mean, because the evidence, I think, will show that they were not doing repair work although they were paid the repair rate.

Referee: That is the sum total of your objection, is it?

Mr. Stark: Yes.

Referee: Overrule the objection. Will you read the question back?

(The following question was read back by the reporter: "And each and every one of those six men that you have mentioned took the status of repairmen on board an ocean-going ship when they were on board a ship?")

A. None of the men in my crew actually ever did repair.

Mr. Wisecarver: Weren't they handling the materials that were part and parcel of the repair of the ship?

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A. They were handling the materials to be used in repairing the ships, but they never did the actual repair work itself.

Q. Did you send other men in there who did that repair or did they come from other foremen?

A. They came from other foremen.

Q. But they were shifting the materials that were a part of the repair job, weren't they?

A. That is correct.

Q. When a workman or joiner was taking materials from [fol. 53] the shop to be used on the ship, particularly if the ship had its fires pulled during the course of the repairs, they would have to take that material on board the ship, wouldn't they, themselves?

Mr. Stark: I am going to object as being a little complex. I am not just sure as to what Mr. Wisecarver means. He said a workman or a joiner. Which is he talking about?

Mr. Wisecarver: Both.

Referee: I think he could reframe the question.

Mr. Wisecarver: Strike it then. Mr. Entwistle, when a joiner takes materials from the shop to shore to be used in the repair of the ship, if the ship's equipment has been put out of commission during the course of the repairs, is it necessary for the joiner to take the material onto the ship where the other men will attach it to the ship?

Mr. Stark: I am going to object to it on the grounds that it assumes a joiner carries materials from the warehouse to the ship, which is not in evidence, and the exact opposite is in evidence.

Referee: Overruled. In one sense he is a joiner.

Mr. Wisecarver: He was rated as a joiner and paid as a joiner.

A. If the material was carryable; that is, if a man could lift it up and put it in his arms and carry it aboard a ship, there was no sense in having a crane lift it aboard. In that sense, he would take it aboard the ship.

[fol. 54] Q. Yes. You can't say now the number of times that it was necessary for him to go aboard ship in carrying things on the ship?

A. That as I say, to the best of my knowledge, I can only pin it down to about two or three times.

Referee: Anything else?

Mr. Wisecarver: Q. But that is a long time ago. Would you have any special recollection now of it?

A. Beg pardon?

Q. As to the number of days that you had done it?

A. I don't quite get you.

Q. I say, after this length of time, would you still have a recollection as to the number of times that you would actually send him aboard ships?

Mr. Stark: I am going to object—has been asked and answered.

Referee: Overruled.

A. As I say, sir, at this time I can only recollect two or three possible times that I have sent him aboard the ship.

Referee: I think it has been answered and re-answered.

Mr. Wisecarver Q. Do you know what ships that you did send him on?

A. The Moultrie was one. There was a ship in berth five that had her holds shattered by an airplane batting into it. It started with a "C"—Corona, I believe. I would stand corrected on that, and another ship in the basin. They were the three instances that I am quite sure in my mind that I did send him directly aboard the ship.

[fol. 55] Q. Those that you speak about in the basin—that is in the dry dock, isn't it?

A. Yes, sir.

Q. Do you know that the Moultrie was in dry dock on this occasion?

A. You mean at the time of the accident?

Q. Yes. Where it was at the time of the accident.

A. At the time of the accident it was tied up at berth four—not in dry dock.

Q. That is not in dry dock?

A. No.

Q. But do you know whether it had been in the dry dock?

A. I couldn't say, sir. That was my second brief encounter with the Moultrie. It might have been moved three or four times.

Q. Now, the work on new construction after V-J Day was only on the ships that had been launched prior to V-J Day, wasn't it?

Referee: Ships that had been launched?

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Mr. Wisecarver: Yes, prior to V-J Day.

A. I am not too sure that hulls forty-five and fifty had been launched before V-J Day.

Q. If I stated to you that the last launching of a new ship was on approximately the 13th of August, would that cause a better recollection on your part?

A. No. I will tell you, if I may state my reasons why it would not.

Referee: Certainly.

[fol. 56] A. In my course of employment at Richmond, there had been hundreds of ships launched and I never paid any attention to the launching of a ship.

Mr. Wisecarver: Q. You don't know then the last day of launching of any new construction?

A. No, sir.

Q. But after V-J Day, wasn't it a fact that no new construction was taken as new work, but only the repair of ocean-going vessels?

A. I don't quite get the meaning of that question.

Q. I say, wasn't the new work that came into the Yard or started in the Yard after V-J Day entirely repair of vessels?

A. So far as I know, I guess you are right.

Mr. Wisecarver: I think that is all at this time.

Referee: About lunch time, gentlemen. Had you finished?

Mr. Stark: I think if I could have about five minutes for re-direct, so this witness could be excused.

Q. Mr. Entwistle, you have testified in response to Mr. Wisecarver's question that you cannot say with certainty exactly what Mr. Baskin was doing on each day he was paid the repair rate; is that correct?

A. That is right, yes.

Q. Can you say with certainty that, apart from the two or three occasions when you sent him aboard an old vessel, the work for which he was being paid the repair rate did not take place aboard an old vessel?

[fol. 57] Mr. Wisecarver: Just a minute. We will object to that as leading and suggestive.

Mr. Stark: I think that is a proper question in view of the cross-examination.

Referee: Well, I don't know that he is leading the witness, but he has testified—has answered the very same thing not once, but two or three times.

Mr. Stark: All right, sir.

Referee: I don't think he is being led at all. Overruled. You may answer. I think you have answered it a number of times, but if there is any question in counsel's mind, let's have the answer once more. Will you read the question?

(The following question was read back by the reporter: "Can you say with certainty that, apart from the two or three occasions when you sent him aboard an old vessel, the work for which he was being paid the repair rate did not take place aboard an old vessel?").

A. I would state with certainty that at least the major portion of his repair time was not used aboard ship.

Mr. Stark: Q. Now, you have testified also to the fact that you sent Cotton and Johnson only rarely to do work aboard old vessels?

A. That is correct.

Q. And what was the reason for that?

Mr. Wisecarver: Just a minute, incompetent, irrelevant and immaterial—we object to that.

[fol. 58] Mr. Stark: Well, that is a point brought out by counsel on cross-examination. I am going to show that the reason is the same as far as Baskin is concerned.

Referee: We are not trying the case with respect to Johnson. Now, unless it affects in some way Baskin——. Are you making any contention that the attitude of the leaderman with respect to Johnson or this other gentleman has anything to do with the status of Baskin?

Mr. Stark: I wanted to show that the foreman did not send the slow members of his crew aboard old vessels and establish that Cotton and Johnson were in the same classification as Baskin.

Mr. Wisecarver: Neither slowness or I.Q. is necessary in order to establish admiralty jurisdiction.

Referee: Q. Why did you in a sense lump these three men together—Johnson, Baskin and the other gentleman you mentioned—in the sense that you did not ordinarily refer them on repair jobs?

A. As I mentioned before, so far as work that I was

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responsible for on repair ships were concerned, they were spot jobs, requiring me to get the material there as quick as possible so the men could work on it; therefore, I had to have men who knew their way around, had a little initiative to get the material there, place it aboard the ship, put it as close a position to the erection spot as possible and get off.

[fol. 59] Q. Am I to conclude that the reason you didn't send these other two gentlemen ordinarily on repair work was the same reason that you didn't send Baskin on repair?

A. Correct.

Mr. Stark: And did you send Baskin even less often than Cotton and Johnson?

A. Oh, yes, definitely.

Mr. Stark: That is all.

Mr. Wisecarver: It's understood that all of those questions are objected to as incompetent, irrelevant and immaterial to this issue.

Referee: Is there anything else? Matter will stand continued to 3:30 this afternoon.

Referee: Before proceeding with the next witness, I find in the file certain medical reports of O. W. Jones, Jr., M.D. dated October 18, 1946, another report by Dr. Jones bearing the date February 18, 1946, and a report of Maier I. Tuchler, M.D. of March 5, 1946. I assume those are being offered on behalf of the applicant, are they? That is correct?

Mr. Stark: Yes.

Referee: Copies have been served?

Mr. Wisecarver: Yes.

Referee: Those reports are received in evidence and marked Applicant's Exhibit No. 1.

[fol. 60] JOHN MCMANUS, called as a witness in behalf of the applicant, being first duly sworn, testified as follows:

Referee: Q. What is your full name?

A. John McManus.

Q. M-c?

A. Yes.
Q. M-a-n-u-s?
A. Yes, sir.
Q. Address, Mr. McManus?
A. 1728 - 9th Street, Alameda.
Referee: Mr. Stark.

Mr. Stark: Q. What is your present working position, Mr. McManus?
A. I am employed by United Engineering at Alameda.
Q. What is your post?
A. I am erection superintendent.
Q. Did you have occasion to work for Kaiser Company during the recent war in shipyard No. 3?
A. Yes, sir.
Q. What period of time did you work there?
A. From September '43 to June '46.
Q. What was your post during that period of time?
A. Joiner Superintendent.
Q. What were your duties as joiner superintendent?
A. Entire supervision over men and material.
Q. In holding that position, did you have general supervision of a crew whose leaderman was Thomas Entwistle and a member of which was Reuben Baskin?
A. Yes.
Q. And did you have general supervision of that crew [fol. 61] during the entire period from your arrival at the Yard as testified to by you to and including December 10, 1945?
A. Yes, sir.
Q. Did you know the applicant, Mr. Baskin, personally?
A. Yes, sir.
Q. And how long before December 10, 1945, had you known him?
A. Oh, a week or so after my arrival in Yard 3.
Q. Do you know of your own knowledge what Mr. Baskin's duties in Yard 3 were?
Mr. Wisecarver: At what time?

Mr. *Baskin*: Calling your attention to the period between the time of your arrival in September, 1943 to and including December 10, 1945, the question is—do you know what Mr. Baskin's duties were in Yard No. 3 during that period of time?
A. Yes.

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Q. And will you describe them for me, please.

A. He assisted bringing material from the warehouse to the dock, from the dock to the ship, from the ship to the desired location aboard the ship.

Q. What kind of ships are you referring to?

A. C-4's.

Q. And what were C-4's?

A. Well, a maritime type of——

Referee: (Interrupting) Under construction there at the Kaiser Yard at the time?

A. Yes.

Mr. Stark: Q. Do you know what Mr. Baskin's classification was?

A. Joiner journeyman.

Q. Did he perform the duties of a joiner?

A. No, sir.

[fol. 62] Q. Did you hear Mr. Entwistle define a joiner?

A. Yes.

Q. Would you agree, generally speaking, that those were the duties of a joiner?

A. Could be elaborated upon, but in the main it was correct.

Q. And did Mr. Baskin perform any of the duties of a joiner as described by Mr. Entwistle?

A. No, sir.

Q. What was Mr. Baskin's classification—that is, what term describes the duties which he did perform?

A. He was in the material crew. Would be a material man.

Q. And was there any payroll classification which was called material man?

A. Not to my knowledge.

Q. Now, did Mr. Baskin normally and customarily work aboard old vessels and by old vessels I mean repair ships?

A. No, sir.

Q. And why not?

Mr. Wisecarver: Just a minute. It's incompetent, irrelevant and immaterial.

Mr. Stark: If you know—I will amend—if you know.

Referee: Overruled.

Mr. Stark: You may answer.

Referee: It would be better to ask him if he knows.

Mr. Stark: Mr. McManus, do you know why he didn't work aboard old vessels?

A. Yes.

Q. And will you tell us why?

Mr. Wisecarver: We will object to that, incompetent, and immaterial. The question is what was he doing at the time of the accident.

[fol. 63] Referee: Overruled.

Mr. Stark: You may answer.

A. I didn't want him aboard repair vessels.

Q. And did you issue instructions to that effect?

A. Yes.

Q. And to whom were those issued?

A. Entwistle.

Q. And why did you issue such instructions?

A. Three or four reasons. One was he created dissension among skilled mechanics; the other was he was easily confused and was liable to become lost upon a vessel type he had never seen before. He worked much better on ships which he was familiar with.

Q. And do you know whether your instructions were carried out?

A. In the main, yes.

Q. So that was it the exception to Mr. Baskin's general duties that he happened to be on the Moultrie on December 10, 1945?

Mr. Wisecarver: Just a minute. We object, incompetent, irrelevant and immaterial, also leading and suggestive.

Mr. *Baskin*: If you know.

Mr. Wisecarver: Whether he knows. I suppose he would know.

Referee: Objection overruled.

A. I would say it was an exception.

Mr. Stark: Q. Now, calling your attention, Mr. McManus, to the fact that there were two rates of pay, one rate for new construction, and one rate for repair. I ask you the question: whether, the fact that a man was paid the repair rate meant that he did repair work aboard an old vessel?

[fol. 64] Mr. Wisecarver: Just a minute, we object to that, incompetent, irrelevant, immaterial.

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Referee: Overruled.
A. Not necessarily.

Mr. Stark: Q. What other work called for the repair rate?

A. Might work in the shop. He might work in handling material from the dock to the shop; from the shop to the dock; from the dock to the ship and never be on the ship.

Q. But he would be paid the repair rate for doing that?

A. In handling material in that case he would be getting the repair rate.

Q. In other words, the repair rate was used for billing purposes?

A. Yes, sir.

Mr. Wisecarver: Q. For what purposes?
Mr. Stark: For billing purposes.

Q. And will you tell us the reason why there was one rate for repair and one rate for new construction?

Mr. Wisecarver: Object, incompetent, irrelevant and immaterial to any issue in this case.

Referee: Overruled. Q. Why the differential, Mr. McManus, if you know?

A. Yes. It was a move instituted by the Metal Trades Council to encourage new ship building. At the time we were short of work on this coast. It was agreed upon by the unions and employers back in '35, '34 that new construction could be encouraged on the west coast by a differential on new and repair work.

[fol. 65] Mr. Stark: Q. Now, is it correct that the new construction work was being done under a contract which Kaiser had with the Maritime Commission?

A. Yes, sir.

Q. And work which was done on repair ships, was that done for the owners of the ships?

A. It was done for various Government agencies like WSA, done for private operators and so on.

Q. What kind of a basis was that done on?

A. The basis between Kaiser and the individual operator of the ship.

Q. Was that a time and materials basis?

A. No. In certain cases, it was. Certain cases it was a fixed price.

Q. And is it correct that anything in any way connected with that repair work was charged at the repair rate, whether on land or on the ship?

A. Yes, sir.

Q. Now, calling your attention, Mr. McManus to V-J Day, August 13, 1945, was new construction work still going on in the Yard at Kaiser No. 3?

A. Yes, sir.

Q. And what ships were still under construction, if you know?

Referee: Do you want the names of the vessels?

Mr. Stark: Just the hull numbers, if you remember?

A. Well, 46, 47, 48, 49 and 50.

Q. And were those all new construction vessels?

A. Yes, sir.

Q. Now, were those ships commissioned on or before V-J Day?

Mr. Wisecarver: We object to that as being incompetent, [fol. 66] irrelevant and immaterial to any issue in this case.

Mr. Stark: If it please the referee, Mr. Wisecarver has made the point with respect to the launching of the ships. I should like to establish what the status of these ships was.

Referee: Objection overruled.

Mr. Wisecarver: They were being completed. They had been launched.

Referee: Let him answer the question. Will you read the question back?

(The following question was read back by the reporter: "Now, were those ships commissioned on or before V-J Day?")

A. None of them were.

Q. They were all commissioned subsequent to August 13, 1945; is that correct?

A. Yes, sir.

Q. When was the last ship commissioned and put to sea, if you know?

A. First week in April commissioned The Snapper, 1946.

Q. So, was work on those new construction vessels going on at all times from V-J Day to and including December 10, 1945?

A. Yes, sir.

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Q. And was that the work upon which Reuben Baskin was normally and customarily employed?

Mr. Wisecarver: Just a minute, we object, leading and suggestive, compound and irrelevant and immaterial to the issues.

[fol. 67] Referee: Overruled.

A. Yes, sir.

Mr. Stark: Mr. McManus, if you know, in what stage of construction is a ship when it was launched at Kaiser?

A. She had superstructure and engine. She had no interior, Class B. bulkheads.

Q. Was she anywhere near being finished?

A. No Class B. bulkheads.

Mr. Wisecarver: That is indefinite.

Mr. Stark: I will rephrase it. How far was such a ship from being finished?

A. As far as the joiner work was concerned or as far as the entire ship was concerned?

Q. As far as the entire ship was concerned?

A. I don't know. Roughly, two-thirds finished when she was launched.

Q. And about how long did it take a ship to be finished up to the point of commissioning after she was launched, calling your attention to these hulls numbered 46 to 50.

Mr. Wisecarver: You are referring now before V-J Day or after V-J Day?

Mr. Stark: From the time these hull numbers were launched until they were completed.

A. Well, we launched The Snapper in August of '45 and she was commissioned in April, '46.

Q. And was that one of the hull numbers forty-six to fifty?

[fol. 68] A. That was fifty.

Q. That was fifty?

A. Yes.

Q. Do you know of your own knowledge how many times Reuben Baskin was aboard old vessels in the course of his work at Kaiser?

A. No, sir.

Q. And is that something which Thomas Entwistle, the leaderman, would have knowledge of?

A. Yes, sir.

Q. Mr. McManus, you were present this morning when Mr. Entwistle testified; is that correct?

A. Yes.

Q. Calling your attention to a conversation to which Mr. Entwistle testified occurring between V-J Day and December 10, 1945, in which Mr. Baskin was the subject of conversation, do you recall that conversation?

A. Yes, sir.

Q. And can you tell me what was said either by you or by Mr. Entwistle?

Mr. Wisecarver: To which we object, as incompetent, irrelevant and immaterial and hearsay.

Referee: Overruled.

A. Well, in line with the general re-organization on paper of the joiner department to take care of an expected magnified program of repair, we re-organized and conferred and decided certain men would be let go; certain men would stay.

Q. And was there any decision with respect to Reuben Baskin?

A. Yes, sir.

Q. And what was that?

A. To the effect that he would be kept on new construc-
[fol. 69] tion as long as there was new construction, but not on repair work. We would let him go on repair work.

Q. In other words, is it correct that when the new construction work was over, you expected to discharge him?

A. That is correct.

Mr. Stark. That is all the questions I have.

Referee: Cross-examine.

Mr. Wisecarver: Q. You heard, Mr. McManus, though that he was sometimes put on old vessels, didn't you, when they were being repaired?

A. Yes, sir.

Q. And when he was on those vessels, he worked as any other member of the crew would work that was sent on there, wouldn't he?

A. He would work as any other member of the material crew.

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Q. Yes. And that material crew's work was a necessary part of the repair of the vessel, wasn't it?

A. Yes, sir.

Q. And it's necessary to have different sorts of crafts in the repair of a vessel, isn't it; that is, you have boilermen; you have carpenters; and you have metal men? You have various different crafts represented in the repair of the vessel?

A. Yes, sir.

Q. And also you have electricians?

A. Yes.

Q. And it's necessary that they have as part of their helpers men who carry the material around and help them, isn't it?

A. Yes, sir.

Q. That is all part and parcel of the repair of the vessel?

[fol. 70] A. Yes, sir.

Q. And if on this occasion in question on December 10, Baskin was on there with four other men in handling materials, changing them from hold 5 to hold 4, that was a part of the repair of the vessel?

Mr. Stark: I object to that as calling for a conclusion.

Mr. Wisecarver: It's his witness called apparently as an expert that knows this.

Referee: Well, the way you put the question, it's a hypothetical one. You say, if these things—

Mr. Wisecarver: I said when he was on the ship on December 10.

Mr. Stark: It hasn't been shown that Mr. McManus even has knowledge that he was on the ship.

Referee: It hasn't been shown—there is no evidence that he knew that the applicant was on the ship.

Mr. Wisecarver: I don't care whether he knows it or not. I said, when the man went on the ship on December 10, 1945, with four other men at the order of Mr. Entwistle, moving the materials from hold 5 to hold 4, that was a part of the necessary repair of that ship on that occasion, wasn't it?

Mr. Stark: Object to that as being a hypothetical question which calls for a conclusion.

Mr. Wisecarver: You put that evidence in yourself.

Mr. Stark: No, I don't think so.

Referee: Have you any knowledge of just what repair work was going on on December 10, 1945, aboard this vessel?

A. Yes, sir.

[fol. 71] Referee: Overrule it. Let him answer the question.

A. Yes, sir.

Mr. Wisecarver: Your answer is, "yes"?

A. Yes.

Q. And the question of the duties of a joiner—actually, the classification of joiner included at the Kaiser Yard work of the men handling the materials and the people who actually affixed the materials, didn't it? That was included in the classification of joiner?

A. No, sir.

Q. What's that?

A. No, sir.

Q. They were paid as journeyman joiners?

A. Yes.

Q. And classified as such?

A. Yes, sir.

Q. So, it was all one classification?

A. In your first question, you said that it was a normal operation for a joiner.

Referee: I think he misunderstood the question.

Mr. Wisecarver: I said that at the Kaiser Yard, the classification of joiner comprised men who were affixing and handling materials, particularly wooden materials and metal materials, both handling them and affixing them to the ship—comprised both jobs?

A. Yes, sir.

Q. That was all one classification of joiner?

A. Yes.

Q. They were paid the same wage, all of them, as journeyman joiner?

A. Yes.

Q. And Baskin was a journeyman joiner, wasn't he?

Referee: You mean that was his classification?

A. His classification was journeyman joiner.

[fol. 72] Mr. Wisecarver: Q. He was paid as such?

A. Yes.

BLEED THROUGH—POOR COPY

Q. Now, then, the men who work in the Kaiser Yard, they worked for the Kaiser Co., Inc., didn't they?

A. Yes, sir.

Q. They were hired by the Kaiser Co., Inc.?

A. Yes, sir.

Q. They were neither hired by the Maritime Commission, nor were they hired by individual owners of ships, were they?

A. No, sir.

Q. And that was so whether they were on new work or on repair work?

A. Yes, sir.

Q. And isn't it a fact that all of the new work that was taken on after V-J Day, which I believe was August 18, 1945, all new work taken on was repair work, wasn't it?

A. That is—you mean fresh work?

Q. It was all repair work after that?

A. Yes.

Q. And a man who was hired by Kaiser Co. as a journeyman joiner would be transferred at will by the men in charge of him from new work to repair work, wouldn't he?

A. Yes, sir.

Q. That is, whenever they wanted a man on repair work, they would transfer him over to repair work?

Mr. Stark: You mean would or could?

Mr. Wisecarver: Not only could, but did, isn't that true?

A. Yes.

Q. Yes. And in each case he would be working for Kaiser Co. simply being transferred from one duty to another duty; isn't that it?

A. Yes, sir.

Mr. Wisecarver: I think that is all.

Referee: Anything else?

Mr. Stark: No.

[fol. 73] REUBEN FRANKLIN BASKIN, the applicant herein, called as a witness in his own behalf, being first duly sworn, testified as follows:

Mr. Stark: Q. Are you the applicant, Reuben Franklin Baskin?

A. Yes.

Q. And did you work for the Kaiser Shipyard No. 3?
A. Yes.
Q. And do you remember that you were hurt on December 10, 1945?
A. Yes.

Referee: Before you proceed any further, Mr. Stark—I have your address down here, Mr. Baskin, as being 2663 Warren Road, Box 790A, Route 1, at Memphis, Tennessee. Is that your present home address? That is your address?
A. At present, for the present, yes.
Q. Is that your permanent address? You are out here temporarily?

(No answer).

Mr. Stark: Yes, he is out here temporarily.
Mrs. Dunn: At 754 Ventura Street, Richmond.
Mr. Stark: Q. Mr. Baskin, did you work very much on old ships?
Mr. Wisecarver: Just a minute. We object to counsel asking leading questions.
Referee: I don't know just what will develop here, Mr. Wisecarver, but I can anticipate that it might become necessary to ask questions that are to some extent leading.
Mr. Wisecarver: I will object to the applicant's case being made by testimony by the attorney.
[fol. 74] Referee: I would judge that certain of the questions I had occasion to ask in reference to his address evinced apparent difficulty on the part of the applicant to respond. Now, I don't know—
Mr. Stark: That is correct.
Referee: —if that is at all typical of what we are to expect in the course of interrogation or not, but if it is—
Mr. Wisecarver: That is all the more reason why he should avoid using leading and suggestive questions.
Referee: I will ask you to avoid leading questions as much as possible.

Mr. Stark: Q. Mr. Baskin, what did you do at Kaiser?
A. Well, I carried the material. I carried the material aboard new ships from the dock to the warehouse and placed them, put them, aboard ships in the rooms where they went.
Q. And did you go aboard old ships very much?
A. No.

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Q. Do you remember about how many times you went aboard old ships?

A. Two or three times.

Q. Two or three times aboard old ships; is that correct?

A. Yes.

Q. Were you hurt on an old ship?

A. Yes.

Q. And what happened to you that morning?

A. I don't remember.

Q. Were you unconscious for a period of time?

A. I was.

Q. And do you know where you got hurt?

A. No.

Q. Do you know what parts of your body were hurt? Do you know that?

[fol. 75] A. My right arm and my hip, right leg, and my fracture across the base of my skull.

Q. Are you still bothered by those things?

A. Still bothered by them.

Q. Have you been able to work since you were hurt?

A. I haven't.

Referee: You have not?

A. I have not.

Mr. Stark: Q. With whom do you live at the present time when you are in Tennessee?

A. With my sister.

Q. And that is Mrs. Dunn who is in the room here?

A. That is.

Q. And did she bring you out here?

A. She brought me out here. She did.

Referee: Q. What's the matter with your right eye?

A. It was paralyzed. The nerve was paralyzed by the fall.

Q. Did the condition of the eye then come on after this accident?

A. No, no.

Q. Did you have any trouble with that eye before the accident? Before you fell, did you have any trouble with the eye?

A. No.

Mr. Stark: Q. And does your back still hurt you?

A. Back still hurts, sometimes.

Q. Is it difficult to walk?
A. Difficult to walk, yes.
Q. Can you shave yourself?
A. I can't shave myself.
Q. Does somebody always shave you?
[fol. 76] A. My mother usually shaves me.
Q. And did you shave yourself before you got hurt?
A. Uh huh.

Mr. Stark: You did.
Referee: Q. How do you spend your time, Mr. Baskin? What do you do?
A. Well, around the farm there.
Q. Are you up and around?
A. Up and around. Of course, my balance is not too good yet. I am a bit staggery yet.
Q. Can you be on your feet walking around?
A. Uh huh.

Mr. Stark: Q. Did you ever go any place by yourself, Mr. Baskin; that is, outside of the house?
A. Well, around the place there, yes.
Q. Did you ever go down town by yourself?
A. Never.

Referee: Q. Can you work there on the farm? Can you do farm work?

(No answer).

Mr. Stark: Q. Can you lift things, Mr. Baskin?
A. Not exactly because that wrist is kind of stiff yet.

Referee: Q. The right wrist?
A. Yes.

Mr. Stark: Q. Do you have trouble sleeping?
A. I do.
Q. And what about the condition of your arms in the morning when you wake up?
A. Well, they are sore and they bother me very much.
Q. Can you lift them up above your shoulders in the morning?
A. Not very good.
Q. And is your back stiff in the morning too?
A. It is.

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[fol. 77] Q. Does your sister live on a farm in Tennessee?
A. Yes.
Q. She does live on a farm?
A. Yes.
Q. And do you feed the chickens and things like that?
A. Yes.
Q. You do do that?
A. Yes.
Q. But do you do any heavy work, lift anything?
A. No.
Q. You are not married, Mr. Baskin, are you?
A. Nope.
Mr. Stark: I think that is all.

Referee: Has there been any report of the recent medical examination?

Mr. Stark: No. Do you remember when the last time was that you went to a doctor?
A. I think Dr. Jones.

Mr. Wisecarver: While he is here I would like to have him re-examined by Dr. Card.
Referee: Is there anybody else that is going to examine other than Dr. Card? Are you just going to have one examination?
Mr. Wisecarver: That is his specialty.
Referee: I haven't seen Dr. Card's reports.
Mr. Wisecarver: That is one on there.
Referee: I know nothing about the contents of the report.
Mr. Stark: There is a long medical.
Mr. Wisecarver: He is a neuro-psychiatrist. We had him examined also by a woman who is an expert in rating mental capacity and she rated him just on the border line—80 per cent I.Q. before the accident and probably 50 after.
Mr. Stark: I think it was 30 afterwards if you want the correct statement of what Dr. Bradley did.
[fol. 78] Mr. Wisecarver: My impression was it was 50. It will speak for itself.

Referee: Q. How does your head feel, Mr. Baskin?
A. Well, it hurts. I have headaches very often.
Q. What part of the head aches.
A. Yes.

Q. What part?
A. Right up around my eye, around through there.

Mr. Stark: Q. Did you feel all right before the accident?
A. I felt all right before the accident, yes.
Q. And you were doing heavy work carrying things, were you? You were able to carry things before the accident?
A. Yes.

Mr. Stark: I think that is all.
Referee: Mr. Wisecarver—

Mr. Wisecarver: Q. Do you remember going on board the steamer Moultrie on the morning you were hurt.
A. No.
Q. You don't remember going on board?

Referee: Q. Can you remember going on that ship the morning you were hurt?
A. I cannot remember.

Mr. Wisecarver: No need if you are willing to stipulate that he was on board.
Mr. Stark: Oh, yes, there is no question about that. There is no doubt about that.
Mr. Wisecarver: He was working on board the Moultrie and he got hurt.
Mr. Stark: We will stipulate to that.
Mr. Wisecarver: I have a statement by Mr. Allen—I [fol. 79] don't know where Mr. Allen is now—I have a statement by him as to what actually happened, but if it's agreeable the stipulation will cover it.

Mr. Wisecarver: Q. What grade did you get through in school, Reuben?
A. Well, I didn't get further than the second grade.

Mr. Wisecarver: I think that is all.

Referee: Q. Do you feel you are getting any better or are you about the same?
A. Well, I don't know. I imagine it would be about the same.
Q. Can you see out of your right eye at all?
A. Not very much.

Referee: Anything else of Mr. Baskin?

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Mr. Stark: I would like to ask if it would be agreeable to the carrier if he were examined also by Dr. O. W. Jones, who has examined him on two occasions.

Mr. Wisecarver: You have the right to have an examination by Dr. Jones. I can't prevent you.

Referee: Would you undertake to arrange for the examination by Dr. Jones as well as by Dr. Card?

Mr. Wisecarver: The company had him examined by Dr. Card. I just want to send him back for a check-up by Dr. Card, but there is no objection, certainly, if you have him examined by Dr. Jones. He is a very able man.

Mr. Stark: We will have him examined by Dr. Jones in order to bring the medical up to date.

[fol. 80] Referee: Anything else of Mr. Baskin?

Mr. Stark: No.

Referee: That is all, Mr. Baskin.

Mrs. Catherine Dunn, called as a witness in behalf of the applicant, having been duly sworn, testified as follows:

Referee: Q. What is your full name, Mrs. Dunn?

A. Mrs. Catherine Dunn.

Q. "K" or "C"?

A. "C".

Mr. Wisecarver: Q. D-u-n-n-e?

A. Just D-u-n-n.

Referee: Q. Your address is the address I mentioned heretofore is it, Memphis, Tennessee?

A. Right.

Mr. Stark: Q. Mrs. Dunn, you are the sister of Mr. Baskin, the applicant?

A. Yes.

Q. And did you bring him out here from Tennessee?

A. Yes.

Q. And does he presently live in your home in Tennessee?

A. Yes.

Q. And were you out in California when he was here during the war?

A. Yes, the entire time.

Q. And did he live in your home while you were in California?

A. Yes.

Q. And for what period of time was that?

A. From March 1943 to March, 1947.

Q. And did he work at Kaiser from about March of 1943 to and including December 10, 1945, if you know?

A. Yes.

[fol. 81] Q. And as a matter of fact, you were also working at Kaiser for a time, is that correct?

A. Part of the time.

Q. What part of the time was that?

A. I was there—we came in March and my last day was December 31, 1943.

Q. And as long as you were at Kaiser, he used to ride with you to work?

A. Yes.

Q. After you left Kaiser, did he go to work and come home by himself?

A. Yes.

Q. How did he do that?

A. Well, while we were in San Francisco (we did live in San Francisco part of the time) he caught a bus to the Ferry Building and took the ferry across to work.

Q. And at night he would come home?

A. Right.

Q. When did you first see your brother on December 10, 1945, after the accident?

A. Shortly before noon, the morning of the accident.

Q. And where did you see him?

A. In the Permanente Foundation Hospital in Oakland.

Q. What was his condition as you observed it at that time?

A. Well, he was unconscious.

Referee: There is no doubt about that. He was unconscious for a number of weeks, wasn't he?

A. That is correct.

Mr. Stark: Q. How long was he unconscious, Mrs. Dunn, if you can state from your own knowledge?

A. Two or three weeks.

[fol. 82] Q. Tell us his condition after he became conscious?

Mr. Wisecarver: I think that could be covered by the medical reports.

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Referee: Don't you think so?

Mr. Stark: I think perhaps it is. I just wanted to establish the extent of the injury.

Referee: I think there is no question he had a serious one. I think you should come down to the present condition, but to go back a number of years, I think it would serve no useful purpose. I take it there is no question that he has been totally disabled every since the accident.

Mr. Stark: We think there is none.

Mr. Wisecarver: I understood that he has been doing some work—how much I don't know.

Mr. Stark: Mrs. Dunn, will you tell us what things about your brother are different today than before he was hurt?

A. Well, he has very little balance for one thing. He has completely lost the use of the right eye. He has some damage to the palate which has impaired his speech. There is a very definite speech impairment.

Referee: Q. Did he have any impairment of speech before the accident?

A. No. My father talked very slowly and so did Reuben, but as a definite impairment, none—but he was slow of speech before, not comparable to what he is now.

Mr. Stark: Q. And is it necessary for you to do certain [fol. 83] things for him today?

A. Yes. He can't shave himself, principally because he can't use his arm well enough and again because he doesn't see as well.

Q. And do you feel it's safe to let him go out by himself in the street?

A. Only on the farm. That was the idea for taking him back. He doesn't go anywhere, not down town or out among traffic by himself.

Q. Somebody always accompanies him; is that correct?

A. Right.

Referee: Q. What is the reason for that precaution?

A. Well, he has fallen several times. We have taken him to town, maybe leave him in the car, and he would decide he wanted to go in the store and get a Coca-Cola, and a time or two he has, because of his balance and his sight, fallen, with serious cuts about the head and bruises on the arm.

Q. He is able to get about all right otherwise?

A. Yes.

Q. Mentally speaking, he is able to go around by himself?

A. Oh, yes.

Q. He isn't confused?

A. No. He is very sure wherever he wants to go and things like that. It's mostly physically impaired.

Mr. Stark: Q. Forgetful?

A. Yes.

Q. Does he hear well, do you know?

A. Well, I would say that he heard fairly well.

[fol. 84] Q. How old is Reuben?

A. Twenty-seven.

Mr. Wisecarver: How much?

A. Twenty-seven.

Referee: What was his birthday?

A. 1920—October 2.

Q. Do you know whether he is right-handed or left-handed?

A. He is right-handed.

Mr. Stark: Q. Do you know what grade he completed in school?

A. Either the third or the fourth—now, I am not sure.

Q. Are you sure it was not the second?

A. I am positive it was not the second.

Q. Mrs. Dunn, was there any medical expense which was expended on behalf of Mr. Baskin for which you were not re-imbursed?

A. Yes. We had two visits to Dr. Jones.

Q. And how much did those cost?

A. Twenty-five dollars each to the best of my knowledge.

Q. And were there any other doctors?

Referee: Just a moment, before we pass that—were you with him when he went to Dr. Jones?

A. Yes.

Q. What did Dr. Jones do, other than examine, if anything?

A. That is all he did do was just give him a thorough examination from head to foot.

Q. Didn't give him any treatment?

A. No, at the first hearing he said it will be approxi-

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mately nine to twelve months before he would make any final statement as to the disability and for me to bring him [fol. 85] back in that period of time for another examination and there was no therapy that would be of any use to him at all at that time. That was the purpose of examination to satisfy us that he was receiving the treatment.

Q. Then you did go back the second time and had the second examination?

A. Yes.

Q. Was there any treatment rendered at that time?

A. No. He stated that he was totally and permanently disabled. We asked at that time if it would get worse and worse and he just told us the best thing to do is not to think about it; serious complications could result, but not to worry about them until the time came.

Mr. Stark: Q. Did he say he might sometime be totally paralyzed?

A. Yes.

Mr. Wisecarver: Just a moment. I think the doctor's reports speak for themselves. We don't want hearsay on a medical question. I ask it be stricken.

Referee: I think it would be better to have it in the form of a doctor's report.

Mr. Stark: All right, let it go out.

Referee: Have you any other questions?

Mr. Stark: Q. Did you take him to any other doctors?

A. Well, his compensation was stopped at one time and they wanted to appoint a legal guardian for him, and we took him to a psychiatrist, Dr. Tuchler, at that time.

Q. And how much did you pay her?

A. It's him.

[fol. 86] Mr. Stark: I beg pardon.

A. Twenty-five dollars.

Q. And his report is in evidence here?

Referee: No treatment rendered by Dr. Tuchler?

A. No.

Mr. Stark: And did you take him to anybody else?

A. We took him to Dr. Stanley Burns for his eyes, to see if glasses would help him any way. They were pretty weak. He is an optitian.

Q. And how much did he charge?

A. I believe fifteen dollars—that is their normal fee. I can't remember exactly.

Mr. Wisecarver: Who was that?

A. Dr. Stanley Burns, B-u-r-n-s. He is in San Francisco.

Referee: Did Doctor Burns give him any treatment?

A. No.

Q. Or prescribe glasses?

A. No, he said it was an extremely nervous condition and he said that it would only complicate the nervousness trying to wear glasses. He suggested we leave them off until his sight began to fail entirely.

Q. Had Reuben been under the care of any eye specialist before that time?

A. No, there was nothing wrong with his eyes.

Q. I mean before Dr. Burns saw him, had he been under the care or observation?

A. The doctors over at Permanente only.

Q. They had an eye specialist over there?

A. I am sure they must have.

[fol. 87] Mr. Stark: Q. Is it correct there was a total of $90.00—that is $25.00 to Dr. Jones on each of two occasions, $25.00 to Dr. Tuchler, and $15.00 to Dr. Burns, which you paid and for which you were not re-imbursed by the carrier?

A. Yes.

Mr. Stark: May I ask questions to establish the request for compensation?

Referee: Do what?

Mr. Stark: May I ask questions to establish the basis for attorney's fee?

Referee: With respect to attorney's fee? I think it might be best if you would submit a letter in that regard, setting forth the services that you have rendered.

Mr. Stark: All right. Those are all the questions that I have.

Referee: Q. Has Reuben been living with you every since he was out of the hospital—

A. Yes.

Q. —following this accident?

A. Yes.

Q. To you- knowledge has he done any work?

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A. He helps mother feed the chickens.

Q. Any work for pay?

A. No, no. He has absolutely not done any work at all for pay. He piddles around the farm and that is all there is.

Q. Does that amount to anything more than a few chores?

A. That is about all.

Referee: Mr. Wisecarver—

[fol. 88] Mr. Wisecarver: Q. Does he milk cows?

A. No.

Q. Does he do any chores at all except feeding the chickens?

A. Well, he turns the faucet to water the chickens and cow, but that is about all.

Q. He was a mental problem, wasn't he, before this accident?

A. I wouldn't say he was a mental problem; I would say that he was mentally slow. He was a thyroid patient. In other words, he was injured at birth, so his thyroid gland never functioned. He has taken thyroid all his life and still does.

Q. You had had him examined by doctors on that account, hadn't you, before?

A. Yes, he was under a baby specialist—well, all the years of his life, I guess, until he was about three. But other than that, he was a normal, healthy, strong person, fully capable of physical work.

Q. He was unable to concentrate, to do any study beyond the third or fourth grade?

A. Well, he was slow. I am afraid that is my mother's fault. She took him out of school because he was a little large for his age. Children are sometimes cruel to others who are over-size.

Q. But, I say, he had great difficulty in concentrating before the accident, did he, or being relied on?

A. No. I would say he was slow mentally, but as far as following instructions or doing what you told him to do, [fol. 89] he was very capable and strong physically.

Q. Well, you heard the testimony of Mr. Entwistle this morning that he couldn't rely upon him to finish something that he started. Did you find that same trouble?

Mr. Stark: I don't think that was Mr. Entwistle's testimony. His testimony was that where he required initiative

—but where he told him to do a specific thing, he always did it.

Referee: Well, regardless of whether it was or wasn't Mr. Entwistle's testimony, I think it's proper cross-examination.

Mr. Wisecarver: Q. Didn't you have trouble with him getting confused and not finishing the job and something of that sort?

A. No. I think any job properly explained, he was very capable of carrying out. He was slow to grasp an explanation.

Q. You would have to explain each new job to him; is that it?

A. Well, he was like any other normal person, if you asked to go here and get something or some place else, he understood as well as you or I, but any complex problem, yes, he was slow to grasp and understand.

Mr. Wisecarver: I think that is all.

Mr. Stark: I have no further questions.

Mr. Wisecarver: I was going to suggest, Mr. Referee, the advisability that there should be appointed a guardian for this applicant.

Referee: Well, you have me at a disadvantage. I don't know what the medical reports will show in that regard. [fol. 90] What do you feel about his condition? Is he able to manage his personal affairs?

A. As far as his business, legally, and the money, I would say, no, he wouldn't be able to make business decisions like you or I, but as far as buying things and counting money—

Q. Can he handle his own affairs?

A. In a business way, I would say, no, buying a house or something like that, he wouldn't know whether to buy that or whether it was worth the money that was being charged for it like you or I would. For one thing, there is a definite mental impairment since the accident too—very very definite. Even though he was slow to understand before, now it's sometimes almost impossible for him to understand.

Mr. Wisecarver: You have actually handled his affairs *every* since his accident, haven't you?

A. Yes.

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Q. Do you feel he is able to take care of his affairs—the affairs which you have handled, do you think he would have been able to do it?

A. No, from a physical standpoint as well as mental.

Mr. Stark: May I ask a question? Will you tell us what happened when the question came up once before, whether he was legally competent?

A. Well, we went to an attorney and he said it was a very legal proceeding to appoint a guardian responsible for [fol. 91] some one that might be declared in court by two competent physicians as totally mentally incapable, so that is why we took him to Dr. Tuchler.

Referee: Of course, the only suggestion is that a guardian ad litem be appointed. I think it might be well, if you have been handling his business affairs and advising him to have you appointed as guardian ad litem.

Mr. Stark: There is no objection from us.

Mr. Wisecarver: Would the applicant be agreeable to you?

Mr. Stark: (To Mr. Baskin) Is that all right if Mrs. Dunn handles your affairs?

Mr. Baskin: Perfectly all right.

Referee: Good Cause Appearing Therefor, it Is Ordered that Catherin Dunn be and she is hereby appointed guardian at litem and trustee in this matter for Reuben Baskin, the applicant.

Referee: Anything else?

Mr. Stark: Nothing further.

Referee: Q. How many members are there in your family?

A. Two boys and two girls.

Q. Yourself and your husband?

A. You mean in my immediate family? I have two children, one nine and one three.

Q. Your household then is composed of yourself and your husband and two children and Reuben?

A. And my mother.

[fol. 92[Referee: Very well. Any other witnesses?

WALTER LEE FELTHOUSE, JR., called as a witness in behalf of the defendants, being first duly sworn, testified as follows:

Referee: May I have your name, please?

A. Walter Lee Felthouse, Jr.

Q. Your address, Mr. Felthouse?

A. 529 Spruce Street, Berkeley.

Mr. Wisecarver: First I wish to say, Mr. Referee, I have here a copy prepared by the Williams, Dimond & Co., who were charterers of this vessel—a copy of the log of the vessel signed by them. If counsel would agree, I would like to have it introduced in lieu of calling them to subpoena the log.

Mr. Stark: I have no objection.

Referee: It can be stipulated then, can it, that the document that has been handed me, and a copy of which has been handed you, I take it, is an excerpt from the log of the S.S. William Moultrie?

Mr. Stark: If Mr. Wisecarver says it is.

Mr. Wisecarver: We asked them to supply it and they have supplied it. I have every reason to believe it is correct.

Referee: Offered on behalf of the defendants?

Mr. Wisecarver: Yes.

Referee: Received in evidence and marked defendants' [fol. 93] exhibit next in order, Defendants' Exhibit B.

Mr. Wisecarver: Q. Mr. Felthouse, what is your occupation?

A. I am administrative assistant.

Q. Of the Kaiser Company?

A. Kaiser Company, Inc.

Q. And you are in the administrative office of the company?

A. Yes.

Q. And do the records pass through your hands, under your supervision?

A. Yes, they do.

Q. Mr. Felthouse, I will ask you if that is a photostat—what is the photostat that I am showing you here?

A. That is a photostatic copy of a sheet from our ship repair log that we maintain at the Yard.

Q. A record kept by the company of the repair work it does on vessels, each one in order?

A. That is correct.

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Mr. Stark: I think I will object. I don't see its relevancy. Apparently, it's a receipt that shows ships that have come to the Yard.

Referee: Your objection?

Mr. Stark: It's irrelevant.

Mr. Wisecarver: It shows the steamer William Moultrie, 301, right there—your thumb is right on it.

Mr. Stark: May I ask over what period of time this covers?

Mr. Wisecarver: Covers the whole period of our repair program.

Mr. Stark: And that is what period? Excuse me for asking the questions.

[fol. 94] Mr. Wisecarver: That is quite all right.

Mr. Felthouse: It was somewhere in '43 up through 1947. I couldn't give you the exact dates.

Mr. Stark: December, 1943?

A. I think there were some in '43. This is only one sheet. This is one of several sheets out of the log.

Referee: Referring to the one sheet.

A. He is referring to the dates on this.

Mr. Stark: What are the dates covered by this sheet?

A. This would cover the ships which arrived the 23rd day of December, 1945, down through—there is one here that was in twice—the 28th of December, 1945.

Mr. Stark: I will object to it then on the ground that it covers vessels which arrived after December 10, 1945 and is not binding on my client.

Referee: Overruled.

Mr. Wisecarver: The number on there, No. 301, William Moultrie, is the vessel that was involved in this particular accident of Mr. Baskin?

A. That is correct.

Mr. Stark: Was the witness mistaken that it covered periods—

A. (Interrupting) I was reading the arrival dates in the shipyards. I am not reading the departure dates.

Q. Would you take another look at it and tell me what periods of time the arrival dates cover?

A. The arrival dates are shown in this column here.

Q. Could you tell me the earliest date and the latest date of arrival time?

[fol. 95] A. Well, as far as I can see, it's November 23rd, the earliest date.

Mr. Wisecarver: 1945?

A. That is correct.

A. And the last arrival date that I see here—I see on this one there is January 23, 1946—the Mission Carmel.

Mr. Stark: I think I have no objection.

Referee: Photostatic copy of the document entitled Ship Repair Log received in evidence and marked Defendants' Exhibit C.

Mr. Wisecarver: I will show you another document here—it's a rather extensive document, Mr. Referee. I am just wondering if we could in some way identify it. Unless you want to have the entire thing put in the record, I can get it photostated.

Referee: Is it the original?

Mr. Wisecarver: It's the complete job and specifications for the repair of the William Moultrie.

Referee: Has counsel seen it yet?

Mr. Wisecarver: Not that I know of. It's the specifications.

Referee: You are only interested, I take it from what you say, in certain portions?

Mr. Wisecarver: It shows the job that was to be done. I assume, unless it can be summarized, that the whole thing would have to be photostated and put in evidence. It has something like, I guess, twenty sheets here.

Referee: Can the witness summarize it?

Mr. Wisecarver: It would be a great aid.

[fol. 96] Mr. Stark: Let me ask you, counsel, if there is any place in here where it refers to moving of timbers from one place to another?

Mr. Wisecarver: It covers the work in there—this one here.

A. It is covered by the work on the cargo holds—those were the holds that he was working in.

Referee: Maybe you could agree that certain excerpts from the specifications might be made up or the photostatic copies thereof might be taken and received in evidence.

Mr. Wisecarver: I am willing to have photostatic copies

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made of the whole thing, if you wish it done. It will be rather bulky because many of these have only one specification per page.

Mr. Stark: Is there anything here, Mr. Wisecarver, which you feel is pertinent except what relates to cargo hold #4 and cargo hold #5?

Mr. Wisecarver: It's all pertinent because it's all for the repair of the vessel and the nature of the repair.

Referee: If it's all pertinent, maybe you had better have it photostated then. That is agreeable, is it not?

Mr. Stark: That is perfectly agreeable.

Referee: Do you want to have it photostated and the photostatic copies substituted in lieu of the original and received in evidence?

Mr. Stark: May I be furnished with a copy of it, so I can study it?

[fol. 97] Mr. Wisecarver: Q. This document that I am showing you is your repair log of the ship, is it?

A. No. It's the specifications for the work on that ship.

Q. That was the work that was done?

A. That is right.

Mr. Stark: I am going to object to that until you specify by whom done.

A. By Kaiser Company, Inc.

Mr. Wisecarver: If you will mark the exhibit number on the first specification, it will appear on the photostats.

Referee: Wouldn't it be best to release it without marking it—we can do that if you want.

Mr. Wisecarver: It is stipulated it might be withdrawn and photostatic copies made.

Mr. Stark: No.

Referee: Marked then, Defendants' Exhibit D, withdrawn by Mr. Wisecarver. It was marked for the purpose of identification, but, of course, upon the submission of the photostatic copies, the copies will be received in evidence and considered a part of the record.

Mr. Stark: I would like to say this for the record: that any portion of that which does not relate to the work which Mr. Baskin was doing, I would say that would be irrelevant—that is, work that he was doing on December 10 on the Moultrie.

Mr. Wisecarver: It is all relevant because it was all one

repair job. It was all one job. They had different specifica- [fol. 98] tions for different things to be done. It merely shows that it was part of the job.

Mr. Stark: It's not binding on my client who worked on an infinitesimal portion.

Mr. Wisecarver: It wouldn't make any difference.

Referee: Let's proceed, gentlemen.

Mr. Wisecarver: I am showing you also a purported time record, Mr. Felthouse. Will you state what that is?

A. This is the transcript of the information contained on the time cards for R. F. Baskin for the period October 1, 1945 through December 10, 1945.

Q. And that shows day by day, does it—

A. It does.

Q. —the number of hours worked and whether on repair work or new construction?

A. That is correct.

Q. In separate columns.

Referee: That is the entire period of Mr. Baskin's employment?

Mr. Wisecarver: That is the last ten weeks.

A. This is only from October, 1945.

Mr. Wisecarver: We will ask that be admitted in evidence, and at the request of applicant's attorney, we have also prepared—we have just a copy; we have not had a chance to have it typed or photostated—copy here from August 13, 1945 to September 28, going back to V-J Day.

Referee: The first document that has been handed me—is there any objection in respect to the receipt of that?

Mr. Stark: Yes, unless counsel will also put in evidence [fol. 99] the record from which these documents were made. As I understand it, he has all the records relating to Mr. Baskin.

Mr. Wisecarver: Mr. Referee, these are just a bunch of cards with punched marks in them that unless you have them interpreted, they mean nothing. That is a certified copy of the payroll and as such it is admissible under the Compensation Act.

Mr. Stark: These are the original records.

Mr. Wisecarver: But it's in code.

Referee: I would judge from the signature that the

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preparation of the list was made by the witness, Mr. Felthouse.

A. Correct.

Q. You went over the original records, did you, and got the data that you set forth on the summary?

A. That is correct.

Mr. Stark: You got that from these records here?

A. That is correct.

Referee: He has the records here. If you want to look at them, you have no objection, have you?

Mr. Wisecarver: I have no objection, but, as I say, they are in code—the punch card system.

Referee: Objection overruled. Document entitled Time Card Record for R. F. Baskin received in evidence and marked Defendants' Exhibit E. Are you offering this?

Mr. Wisecarver: Yes. That I will withdraw.

[fol. 100] Referee: You have no objection to the admission in evidence of this?

Mr. Stark: No objection. I haven't seen it.

Referee: All right. After you have had an opportunity to copy it, then upon the submission of the report, it will be received in evidence.

Mr. Stark: May I also receive a copy of that when you have it photostated?

Mr. Wisecarver: I have given you a copy of No. E. I will send you a copy of this one.

Referee: That will be marked F. Withdrawn by Mr. Wisecarver.

Mr. Wisecarver: During all the time that Mr. Baskin was employed at Kaiser Company, was he paid and directed and on the employment records of Kaiser Company, Inc?

Mr. Stark: I object to that unless a foundation is laid.

Mr. Wisecarver: Withdraw the question. You are familiar with the records kept by Kaiser Company, Inc. with reference to the employment of Mr. Baskin, aren't you?

A. Yes, sir.

Q. And will you state whether or not the Kaiser Company, Inc. was the concern that paid him for the employment from sometime in '43 to December 10, 1945 when he was injured?

A. As far as I know.

Q. He was paid by Kaiser Company, Inc.?

Mr. Stark: I would like to have it established whether or not he was employed by Kaiser at the time Mr. Baskin was employed.

[fol. 101] Mr. Wisecarver: Q. Were you there? You were there in 1943?

A. Yes.

Q. And during all that time?

A. Yes, I was.

Referee: He had access to the records of the company too?

A. I am still with them. I am still with Kaiser Co.

Referee: Is anybody contending that he was working for somebody else?

Mr. Wisecarver: They tried to bring it out they were different concerns that they were contracting with for repairs. I don't know why.

Referee: Anything else?

Mr. Wisecarver: Q. Was he entirely directed by men representing Kaiser Company?

A. Yes.

Q. And what is the fact when he transfers from one job to the other?

A. The yard supervision—the men in the yard are in the employ of Kaiser Company.

Q. If he were sent from new construction work to repair work, that would be for whom?

Mr. Stark: That is hypothetical.

Mr. Wisecarver: When he was sent from new construction work to repair work, who was he still working for?

Mr. Stark: That assumes a fact not in evidence.

Referee: Well, I think it has been covered by other witnesses.

Mr. Wisecarver: It has, but I just wanted—

Referee: If you know, Mr. Felthouse, answer the question.

[fol. 102] A. Kaiser Company.

Mr. Stark: What was your answer?

A. Kaiser Company.

Mr. Wisecarver: In the classification of joiner, what type of work did the men do who were joiners?

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A. They installed the wood work and furniture and trim in the vessel.

Q. Did it include the handling and carrying of materials on the vessel?

A. Yes, it would include the handling of materials.

Referee: Anything else?

Mr. Wisecarver: Q. Were you familiar with the actual work—that is, personally familiar with the actual work going on in the Moultrie?

A. No, I was not.

Q. You weren't connected with that work?

A. No.

Q. I see. Was Mr. Baskin rated and paid as a journeyman joiner?

A. As far as I know, sir.

Q. Oh, yes. I notice on this sheet, this employment sheet, there were various times when he was paid the repair rate, and it doesn't appear on the last one there on December 10. Do you know what was the mechanism, how that happened to appear, that he worked eight hours on December 10. The testimony was he was injured a little after nine o'clock.

A. Well, that was undoubtedly a result of our time keeping methods at the yard.

Q. What was that?

A. That the time cards were generally filled out early in [fol. 103] the day for men that were on the job, and I doubt very much if the joiner department, as such, knew that the man was injured until he was out of the yard and we customarily paid the man the full shift when he was injured, at his base rate of pay.

Q. Irrespective of whether he worked it or not?

A. That is correct.

Q. If they are changed to repair work, is it incumbent upon them to have their card checked according to the amount of repair work that was done?

A. Who should?

Q. The employee. Does the employee have his card checked for the amount of repair work he has done?

A. They generally check them; however, the marking of the card was up to the employee's supervisor.

Q. And if he was injured and rendered unconscious, how would the card go through, just made out by some underling?

A. It was probably made out in the joiner department office. I don't know for sure, sir, where that card was actually made out.

Mr. Stark: I will submit this is speculative.
Referee: It is.

Mr. Wisecarver: Q. Do they always give them pay for the full day's work when they are injured during the day?
A. Yes.

Mr. Stark. That is a law.
Referee: All right, gentlemen, any more questions of Mr. Felthouse? We are not going to get through unless you [fol. 104] start to step on it.
Mr. Wisecarver: I think that is all.
Mr. Stark: I would like to ask Mr. Felthouse, calling his attention to exhibits—

Referee: Is this going to be a protracted cross-examination, Mr. Stark?
Mr. Stark: No, sir, very short.

Mr. Stark: Q. —calling his attention to Exhibit E and F, where there is anything on either of those exhibits which shows whether the repair work which was paid for was done on the ship or off the ship?
A. No, there is not.
Q. Is there anything on the records from which you made these which shows whether the repair work was done on a ship or off the ship?
A. No, there is not. It's simply for the ship.
Q. Did you know Mr. Baskin personally?
A. No, I didn't.

Mr. Stark: I think that is all.

JOHN G. SKINNER, called as a witness in behalf of the defendants, having been duly sworn, testified as follows:

Mr. Skinner: John G. Skinner.

Mr. Wisecarver: Q. And your occupation?
A. I am dock master, Kaiser Company, Yard 3, at present.

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Q. What were you in 1945, December?

A. I was a mold loft superintendent.

Q. Were you familiar with the work that was done by [fol. 105] the joiners in the repair of the S.S. Moultrie?

A. Not with the S.S. Moultrie, but I was familiar with the work of the joiners, being an allied trade in the shipbuilding.

Q. And do you know what the lumber was used for in the hold, in the fifth hold of the Moultrie?

Mr. Stark: I object to that unless the foundation is laid. He just testified he didn't know.

Mr. Wisecarver: I am asking if he knows what that lumber would be used for?

A. Yes.

Mr. Stark: I don't think he has testified yet that he was familiar with the repair job in the Moultrie.

Referee: He testified he wasn't, as I understood his answer.

Mr. Stark: That is the way I understood it.

Mr. Wisecarver: Q. Do you know what the lumber was in the hold of—the fifth hold of the S.S. Moultrie—what it was for?

A. All I can go by is the work orders that were written out for the work that was to be done on that ship, and anything in my department, I would do; the joiner department would be doing their work, but I am familiar with what joiner work would be done.

Referee: Have you seen the work orders with respect to the S.S. Moultrie?

A. No.

Mr. Wisecarver: Showing you the exhibit of the work orders, particularly one having to do with holds, what would that call for?

[fol. 106] Mr. Stark: I object to that on the ground that the record speaks for itself, unless it can be shown that it is something that requires interpreting.

Referee: Is there anything that requires interpretation by an expert witness?

Mr. Wisecarver: Well, I am just asking him what it calls for.

Referee: I am asking you—I haven't read the docu-

ment—is there anything in there that isn't readable, apparent from reading, by ordinary laymen?

Mr. Wisecarver: I don't know that there is, but I wanted to ask—

Referee: (Interrupting) What's the purpose of asking the witness?

Mr. Wisecarver: Then I will ask this: in order to do that work that is specified in the holds, what is it necessary to do in the way of getting material in there?

Mr. Stark: The witness has testified he doesn't know anything about the work that was done in the Moultrie.

Mr. Wisecarver: He is familiar with the work that must be done.

Mr. Stark: He has testified that he is not familiar with it.

Referee: The testimony is that he doesn't know what repair work was being done on the S.S. Moultrie on this occasion, as I understand it.

Mr. Wisecarver: But I am asking him what that specification would call for in the way of lumber and materials on the Moultrie?

[fol. 107] Referee: It speaks for itself, doesn't it?

Mr. Wisecarver: Not necessarily. I will change the question: would that require the bringing of materials into the hold in order to do that work?

A. Yes.

Mr. Stark: I object to that on the ground it speaks for itself. The witness would obviously have to guess as to what was required.

Mr. Wisecarver: He wouldn't guess at all. He might handle that job.

Referee: Objection sustained. I don't think the foundation has been laid to show that this witness has any knowledge of the repair work being done on the Moultrie on this occasion.

Mr. Wisecarver: Q. Mr. Skinner, were you familiar with the work that the joiners would do in making repairs on a ship, where they are removing the old sheathing and repairing the sweat battens and installing the new sweat battens and clips—would you know whether or not that was work that a joiner would have to do?

A. Yes. I am familiar with that type of work that they do.

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Q. And do the joiners do that type of work?
A. Yes, they do.
Q. And in doing that, is it often necessary to change the materials from one hold to another?

Mr. Stark: I think a foundation should first be laid as to what knowledge he has with respect to joiners. Did he supervise joiners? How does he know? Just hearsay or what?

[fol. 108] Mr. Wisecarver: Let's ask him. What is the basis of your knowledge?
A. I have had about twenty years' and six months' experience in shipbuilding. I started in June, 1927 for the Bethlehem in San Francisco and I have been working at it steadily except for a period of two years that I sailed for the Matson Navigation Company.

Referee: Q. You know what joiners do, do you?
A. Well, I have been working with them off and on twenty years in an allied industry.
Q. In a general way how they do it?
A. Yes, sir.

Mr. Stark: Will you ask him whether he supervised joiners at Kaiser?

Mr. Wisecarver: Q. Did you supervise joiners at Kaiser?
A. No, not directly.

Referee: Q. Did you, indirectly?
A. In very scarce instances, where their work coincided with my work, where we both had to work together and my work took the lead and, therefore, I had to give the orders so the whole job fit, in special cases, which did not happen very often.

Mr. Stark: Q. Did you supervise any joiner work aboard repair vessels?

A. Any joiner work aboard, is that what you said? No.
Mr. Stark: Then I object on the ground that no foundation has been laid for the question.
[fol. 109] Mr. Wisecarver: The only foundation this witness needs is to be familiar with the work that a joiner has to do within that kind of work.
Mr. Stark: That speaks for itself.

Referee: Overrule the objection. Answer the question. Do you have it in mind?

Mr. Wisecarver: Let me ask the question again? Do you know if it would be necessary for the joiners to handle this material in the hold in performing that work and to sometimes carry it from one hold to the other hold?

A. Yes.

Q. That is within the work of a joiner?

A. Yes.

Q. And is it necessary for the effecting of the repair of that vessel according to that specification?

A. Yes.

Mr. Stark: That calls for a conclusion.

Mr. Wisecarver: That is all.

Referee: Anything else of Mr. Skinner?

Mr. Stark: I would like to ask Mr. Skinner whether the normal way of moving planks from one hold to another would not be by crane?

A. Yes, that is the normal way.

Mr. Stark: That is all.

Mr. Wisecarver: Q. But if there isn't a crane handy, the joiners do it?

A. Then you do it by hand.

Q. And who does it?

A. The men themselves do it that have to get the job [fol. 110] finished. If it's a joiner, then he has to move it.

Mr. Stark: And if there were a crane, where would that crane be standing, normally and naturally?

A. You have to take generalities, because you have two cranes and the work is divided, so you may not get a crane when you want it exactly. So to expedite the job, you will do it by other means, by hand.

Q. Would the crane normally be standing on the shore?

A. Yes.

Mr. Stark: That is all.

Referee: Anything else of Mr. Skinner?

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Mr. Wisecarver: That is all. We would like to have the applicant examined by Dr. Card, as I stated. We will make

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the appointment just as quickly as we can and see if it can be done this week.

Mr. Stark: If I may, I would like to recall Mr. Baskin to lay the foundation for putting in the check stub for his last pay check. Just take a minute.

Referee: Can it be stipulated that this is his check voucher of the last pay check? I hesitate to take these vouchers in evidence. They may be required for income tax or social security purposes.

Mr. Stark: It dates back to the year 1945.

Mr. Wisecarver: I don't know what day that would cover. The payroll that we have submitted covers each day separately.

Referee: You have no objection to its admission for what it may be worth?

[fol. 111] Mr. Wisecarver: For what it may be worth, but I don't know what it's worth. I don't know what day it refers to.

Mr. Stark: It does show that it covered the period ending December 16, 1945 and that was a Saturday and the accident was on Monday, December 10.

Referee: All right. Have a copy made and submit it and it will be received and made a part of the record. Received in evidence and marked applicant's exhibit #2, withdrawn by Mr. Stark for copying. You can stipulate this is a voucher from Kaiser Company, Inc.

Mr. Wisecarver: I don't know. I assume it is.

Referee: Can't you stipulate to it?

Mr. Wisecarver: Oh, well, I will, if it will do any good.

Mr. Stark: I would like to ask Mr. Baskin a question. Do you remember, Mr. Baskin when you got this? I am showing you applicant's Exhibit 2. Do you remember when you got that?

A. That was paid the last—before the accident.

Q. Did you get this after the accident? Let me ask you, Mrs. Dunn, if she knows. Mrs. Dunn, do you know when he got that?

Mrs. Dunn: Yes, sometime after the accident. It had been held for us and they accepted a statement. They were holding this file, this check, and we were asked to sign an affidavit. We returned it and they mailed him the check.

Mr. Stark: Approximately when was that?

[fol. 112] Mrs. Dunn: About four or five months—could

be a year after the accident. It was quite some time, but we didn't know it was there.

Mr. Stark: That is all.

Referee: How long will you require now to complete your medical examinations and file reports? I can't hold the case up indefinitely.

Mr. Stark: I suggest that we call immediately.

Referee: If it's going to be more than two weeks, I will have to take it off calendar.

Mr. Stark: I certainly hope it can be less than that.

Referee: I will enter the order at this time: Matter to stand open for two weeks for the filing of medical reports; five days thereafter for rebuttal; otherwise, submitted.

Mr. Stark: I would like to make one more request and that is that the copies of medical furnished to me by Mr. Wisecarver, which are copies at least of some of the medical which Mr. Pillsbury testified to this morning, be received as copies of the medical which has been filed with Mr. Pillsbury.

Referee: Is that agreeable?

Mr. Wisecarver: I have no objection.

Referee: You are offering them on behalf of the applicant?

Mr. Stark: No.

Referee: They will be received in evidence and marked Commission's Exhibit #1.

[fol. 113] Referee: The order then on the submission of the case—fourteen days for the filing of medical reports; five days thereafter for rebuttal; otherwise submitted.

[fol. 114] R. F. Baskin vs. Kaiser Company, Inc., Shipyard No. 3 and Hartford Accident & Indemnity Company

A. H. Nelson, Referee
Dictated: March 24, 1948
Claim No. 108-330
Inj. 12-10-45

Report of Referee—Filed March 31, 1948

In re claim of applicant, 25 year old joiner-material man, who sustained injury while on board the vessel S. S. Wil-

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liam Moultrie, a commissioned vessel lying alongside for the purpose of repair in the navigable waters of San Francisco Bay on December 10, 1945, A. H. Nelson, Referee, hereby reports to the Commission as follows:

Hearings: November 10, 1947; December 23, 1947.

Issues: Disability; earnings; occupation; medical liability; jurisdiction of the Commission.

Summary of Testimony as attached hereto and made a part hereof.

Opinion:

There is no dispute concerning the essential facts in this case. Applicant, a 25 year old joiner-material man, while employed on board the S. S. William Moultrie, a commissioned vessel undergoing repair in the defendant's yard, suffered serious and extensive injuries when he fell through a hold of the vessel some 27 feet, landing on a tank. As the result of the injuries so sustained, the evidence indicates that he is now totally and permanently disabled.

The only substantial question concerns the jurisdiction of the Commission.

[fol. 115] It has been uniformly held for many years that contracts for the repair of a commissioned vessel are maritime contracts. The Town of Pelham vs. B. F. Woodland, 3 Fed. 457. The Iris, 100 Fed. 104. Reichert Towing Line vs. Long Island, etc., Co., 287 Fed. 269. The V, 14813, 65 Fed. 2nd, 789.

The fact that a contract is maritime gives maritime flavor to injuries sustained in and about its performance. Robertson on Admiralty (1939) 170.

In the leading case of Southern Pacific Co. vs. Jansen, 244 U. S. 205, the Supreme Court of the United States laid down the general rule that the State law may not extend to maritime matters where to permit it to do so would materially interfere with the characteristic features or disturb the uniform application of the general maritime law. The scope and application of this general principle first stated in the Jensen case has been elaborated in subsequent decisions of the Court.

It has been held by the Supreme Court that services performed in the repair of a commissioned vessel, as dis-

tinguished from a vessel in new constructions, is a matter exclusively within the Federal admiralty jurisdiction. Great Lakes Dredge and Dock Co. vs. Kierjaski, 261, U. S. 479. Compare Grant, Smith, Porter Ship Co. vs. Rohde, 257 U. S. 469.

It is the contention of the applicant in this case, however, that although the injury was sustained in the repair of a vessel, certain exceptional circumstances take it outside the operation of the general rule of exclusive federal jurisdiction [fol. 116] and vests jurisdiction either exclusively or concurrently in the State Commission. In that regard it is pointed out that the applicant was essentially a land employee whose activities in the past had in fact, and by deliberate design of the employer, been confined almost entirely to services on land and that it was only on rare occasions and for short intervals of time that he was assigned to repair work on board vessels. It is further argued that these exceptional circumstances are sufficient to bring the case within that "twilight zone", recognized by the Supreme Court in the case of Davis vs. Department of Labor, 317 U. S. 249, as a proper sphere for the exercise of State jurisdiction.

It is obvious that the facts in the Davis case are not at all similar to those presented in the instant case. The employee in that case was not engaged in the repair of a vessel, but was handling materials both on land and over the water which were being reclaimed in the dismantling of a bridge extending across a navigable stream. The scrapping of these materials was a matter of purely local concern. The repairs in the instant case, on the contrary, were intimately related to navigation and commerce and were, in fact, for the very purpose of enabling the vessel to resume its role as a carrier in foreign or interstate commerce.

We are lead, therefore, to consider the question of the scope and the limits of the so-called "twilight zone" doctrine enunciated in the Davis case. As a matter of prin- [fol. 117] ciple—if principle is to be found at all—what are the metes and bounds of the doctrine or the criteria for determining the field of its legitimate application?

The court in the Davis case makes it clear that however much it may disapprove of the rule of the Jensen decision, it was nevertheless not over-ruling that case, but on the

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contrary, it accepted the Jensen line of demarcation between State and Federal jurisdiction as determined by that line of authority, including among others, the case of Parker vs. Motor Boat Sales, 314 U. S. 244. It therefore appears plain that if upon its facts a particular case falls on one side or the other of the jurisdictional fence under the Jensen line of decision, there is no room for the application of any so-called "twilight zone" doctrine. That, in my opinion, is the situation in this case.

The contention of the applicant that the character of the services being rendered at the moment of injury should not be determinative of the jurisdictional question cannot be sustained in the light of the decision in Parker vs. Motor Boat Sales, Inc., supra. There is considerable similarity in the facts of the two cases. In that case, as here, the employee was usually engaged in work of a non-maritime character. He was a janitor and porter whose duties were on land. Indeed, it appears from the record that he had been "cautioned never to go into a boat or have anything to do with a boat or motor." On that point the facts in the Parker case were stronger than in the instant case in that [fol. 118] the employer's general instructions prohibited the employee from going on the water, whereas in the instant case, the employer's attitude was rather one of minimization of maritime assignments rather than a prohibition. Furthermore, it is to be noted that in the Parker case the purpose of the boat trip was to test an outboard motor incident to the sale of the motor to a customer, a matter which is hardly related to navigation and commerce in any legitimate sense, and unlike the repair of a commissioned vessel, would reasonably appear to be—as the Circuit Court had concluded that it was—of purely local concern. Nevertheless, the Supreme Court, speaking through the same justice (Mr. Justice Black), who wrote the majority opinion in the Davis case, declared that notwithstanding the injured was "predominantly a non-maritime employee", nevertheless, "the habitual performance of other and different duties on land cannot alter the fact that *at the time of the accident* he was riding in a boat on the navigable river and it was in connection with that clearly maritime activity that the award was here made." (Italics ours). It was pointed out by the Court that the Longshoremen's Act, Section 2 (4) expressly provides for its application to

"employees (who) are engaged . . . *in whole or in part* upon the navigable waters of the United States." (Italics the Court's). The Federal jurisdiction was held to be exclusive.

It is accordingly my conclusion that this case is within the Federal admiralty jurisdiction and exclusively jus-
[fol. 119] ticiable under the Longshoremen's and Harbor Workers' Act.

RECOMMENDATION:

Order of Dismissal for Want of Jurisdiction.

(S.) A. H. Nelson, Referee.

AHN bb

[fol. 120] BEFORE THE INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA

Claim No. 108-330

R. F. BASKIN, by his guardian ad litem and trustee, Catherine Dunn, Applicant

vs.

KAISER COMPANY, INC., SHIPYARD No. 3, and HARTFORD ACCIDENT & INDEMNITY COMPANY, Defendants.

ORDER OF DISMISSAL—Filed March 31, 1948

Application for adjustment of claim for compensation having been filed herein, and all parties having appeared, and the matter having been regularly heard before A. H. Nelson, Referee, and submitted for decision, this Commission makes its Findings and Order as follows:

FINDINGS OF FACT

1. R. F. Baskin, age 25, while employed as a joiner-material man on December 10, 1945, at Richmond, California, by Kaiser Company, Inc., Shipyard No. 3, sustained injury arising out of and occurring in the course of his employment.

2. The services of said applicant at the time of said injury in furtherance of the repair of the S. S. William
[fol. 121] Moultrie, a commissioned vessel in active mari-

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time service. The claim asserted herein is within the exclusive admiralty jurisdiction of the Federal government and therefore outside the scope of jurisdiction of the California Industrial Accident Commission.

ORDER

Now, therefore, it is ordered that the proceeding herein be and it is hereby dismissed for want of jurisdiction.

Industrial Accident Commission of the State of California, (S.) Dan Murphy, Jr., A. Watchman, S. W. Macdonald, Commissioners. (Seal.)

Dated at San Francisco, California, Mar. 29, 1948.

AHN bb

[fol. 122] R. F. BASKIN vs. KAISER COMPANY, INC., SHIPYARD NO. 3 and HARTFORD ACCIDENT & INDEMNITY COMPANY

(Filed June 17, 1948)

A. H. Nelson, Referee
June 14, 1948
Claim No. 108-330
Inj: 12-10-45

REPORT OF TRIAL REFEREE ON APPLICANT'S PETITION FOR REHEARING

(Due June 20, 1948)

Applicant's petition for rehearing is addressed to a findings and order denying recovery upon the ground of lack of jurisdiction.

There is no dispute on the facts. Applicant was injured on December 10, 1945, while working on board the S.S. Wm. Moultrie, a commissioned vessel, lying in for repairs on the navigable waters of San Francisco Bay, adjacent to the defendant's repair docks. He had been assigned by his foreman to move certain planks from one part of the ship to another point where they were to be used in replacement of planks in the hold. While so engaged, he stepped through an opening and fell 27 feet, suffering serious injuries from which he is now totally and permanently disabled.

If those were the only facts, there can be no doubt at all that the injury was sustained in the furtherance of a maritime contract for the repair of a vessel, within the exclusive Federal admiralty jurisdiction.

Great Lakes Dredge & Dock Co. v. Kierejewski, 261 U. S. 479.

Robins Drydock & Repair Co. v. Dahl, 266, U. S. 449
[fol. 123] Baizley Iron Works v. Span, 281 U. S. 222

The Jack-O-Lantern, 258 U. S. 96

To argue, as counsel does, that maritime service characterizes only the work of the actual repairman, who is engaged in repairing or fixing a portion of the ship—and does not extend to his helpers or assistants on board the vessel—is to draw a tenuous distinction which finds no support whatever in any authority. The service is maritime because being in the repair of a completed and commissioned vessel afloat, it bears a "direct relation to navigation and commerce". Great Lakes, etc., Co. v. Kierejewski, supra.

But there are additional facts which could conceivably distinguish this case from the usual "repair" case: The applicant in this case did not usually or customarily work in the repair of vessels; on the contrary, he was predominantly a land employee, and it was only on rare occasions and for short periods of time that he was assigned tasks on board ship; and furthermore, this general assignment to work on land was by deliberate design of the supervisory authority. What significance have these additional facts on the jurisdictional question?

I think it is clear that they have none. Maritime service is no less maritime because it is performed at rare intervals, or by a workman who is better suited for work on land.

Parker v. Motor Boat Sales, Inc., 314 U. S. 244 is [fol. 124] directly in point. There, a janitor and porter, whose services normally were wholly on land, and who had been "cautioned by his employer never to go into a boat or have anything to do with a boat or motor" was injured when he accompanied another in a motorboat on a test run. But, said the Court, "the habitual performance of other and different duties on land cannot alter the fact that *at the time of the accident* he was riding in a boat on a navigable river and it was in connection with that clearly

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maritime activity that the award was made." By its decision in the Parker case, "The Supreme Court has placed great emphasis upon the activity of the employee at the moment of his injury." (Standard Dredging Corp. v. Henderson, 57 Fed. Sup. 770).

The fact that an injured workman is injured while only temporarily engaged in a maritime service is sufficient to make the State Workmen's Compensation Act inapplicable, even though his general employment may be non-maritime. Employers Liability Assurance Corp. v. Cook, 281 U. S. 233. That is the applicant's case and the law applicable to it.

The law being clear that jurisdiction is in admiralty, I can see no useful purpose to be attained in attempting to analyze in detail the many and dexterous arguments by which counsel for the applicant seeks to establish the paramountcy of certain State decisions, or the wide scope of the so-called "twilight zone" doctrine of Davis v. Dept. of Labor, 317 U. S. 249, or the parallelism of the facts in the [fol. 125] instant case to those in the Davis case, as well as to those in Teahan v. I.A.C., 210 Cal. 342 and Hammond v. Albany Garage Co., 47 N.Y.S. 2nd 897.

It is enough to say that the "twilight zone" doctrine of the Davis case has never been extended to cover services in the repair of and on board a commissioned vessel. A mere reading of that decision makes it clear that it was never intended to overrule or even modify the authority of the guiding principle of the Jensen line of decisions (of which the Kierejewski and the Parker cases, supra, are illustrative). Its purpose was to *supplement* the Jensen rule within the limited field where no direct authority covered the particular factual situation and where practical minds might reasonably differ on whether or not the maritime feature in the particular case was so predominant as to "materially interfere with the characteristic features or disturb the uniform application of the general maritime law" and thus forbid State action. The doctrine of the "twilight zone" as enunciated in the Davis case, has not been extended by any subsequent decision of the Supreme Court, nor has it been generally invoked by the lesser Federal courts. It has been held to have no application to seamen in determining the jurisdictional question under the Jones Act. Norton v. Warner, 64 Sup. Ct. 747; Occiden-

tal Ind. Co. v. I.A.C., 149 Pac. 841. Indeed, the Davis case doctrine has been criticized as a "quasi-legislative decision" and "another of those hard cases which make bad [fol. 126] law." (De Bardelaben Coal Corp. v. Henderson, 142 F. 2d 481). See also Travellers Ins. Co. v. McManigal 139 F. 2d 949.

The Teahan case, supra, on which counsel heavily relies, was decided by the California Supreme Court in 1930, eleven years before Parker v. Motor Boat, supra. It is obviously clearly distinguishable from the instant case on its facts. It is sufficient to point out that the Court itself specifically stated that it was not concerned with a maritime contract.

The New York case of Hammond v. Albany Garage Co., 47 NYS 2d 897, another case to which counsel attaches particular significance, involved the repair of a refrigerator on board a vessel. The court emphasized that such repair work "involved no repair of any part of the structure of the vessel itself, or even of any essential of navigation and commerce," adding, "The repair of the ship itself, such as repair of a boiler, preparation of the ship to receive cargo, repair to the steering apparatus, repair of a leak in the ship, repair of the motive unit or any of its parts, have a direct bearing on navigation and commerce." But a refrigerator, said the Court, on the contrary, was merely "for the comfort and convenience of the occupants of the boat" and "has no direct relation to commerce and navigation, or to any characteristic feature of the general maritime law . . . it was maritime in character only to the extent that he was working on board a vessel lying in navigable waters." The distinction that the Court points [fol. 127] out in the Hammond case, is the very distinction that counsel is unwilling to concede in the instant case. It is the distinction which is fundamental, and which resolves the jurisdictional question adversely to his contention.

RECOMMENDATION:

That the Petition for Rehearing be denied.

A. H. Nelson, Referee.

AHN bb

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[fol. 128] BEFORE THE INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA

Claim No. 108-330—Filed June 17, 1948

R. F. BASKIN, by his guardian ad litem and trustee, Catherine Dunn, Applicant

vs.

KAISER COMPANY, INC., SHIPYARD No. 3, and HARTFORD ACCIDENT & INDEMNITY COMPANY, Defendants

ORDER DENYING APPLICANT'S PETITION FOR REHEARING—Filed June 17, 1948

Good Cause Appearing Therefor:

It is ordered that applicant's Petition for Rehearing, filed herein April 20, 1948, be and it is hereby denied.

Industrial Accident Commission of the State of California, (S.) S. W. Macdonald, A. Watchman, Commissioners.

[fol. 129] [File endorsement omitted]

DISTRICT COURT OF APPEALS OF THE STATE OF CALIFORNIA
in and for the
FIRST APPELLATE DISTRICT—DIVISION TWO

No. 13927

R. F. BASKIN, etc.

v.

INDUSTRIAL ACCIDENT COMMISSION, etc.

WRIT OF REVIEW—September 17, 1948

By the Court:

Let a writ of review issue as prayed returnable before this court Monday, October 11, 1948 at 10 A. M.

Dated September 17, 1948

Nourse, P. J.

[fol. 130] IN THE DISTRICT COURT OF APPEAL

OPINION—January 11, 1949

GOODELL, J.:

This proceeding was brought to review an order of the commission which dismissed petitioner's application for compensation on the ground that the case is exclusively within federal jurisdiction.

Petitioner was a materialman employed from March, 1943, until December 10, 1945, by respondent Kaiser Company, Inc., at its Shipyard No. 3. His work during that time was entirely on shore (or on ships under construction) with the exception of two or three tours of short duration when he was sent to work aboard ships being repaired.

On December 10, 1945, the S.S. "William Moultrie" was undergoing repairs. She was one of three vessels tied up [fol. 131] side by side at the shipyard wharf in San Francisco Bay and was the farthest out. A crane on the wharf moved materials from place to place on these ships. One of the holds on the "Moultrie" was being repaired. The crane's boom could not reach the planks already on board, to move them from one hold to another, and it became necessary to send men aboard to do so. Despite standing instructions that Baskin should not be sent aboard ships under repair, he was ordered onto the "Moultrie" to help, and while there fell down a hold and was seriously and permanently injured.

In 1927, Congress enacted the Longshoremen's and Harbor Workers' Compensation Act (44 Stats. 1424; 33 U.S.C.A. §§ 901-950). Section 902, subdivision 4, shows that the act covers persons "employed in maritime employment, in whole or in part, upon the navigable waters of the United States...." Section 903(a) provides that "Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States . . . and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law...."

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[1] See 23 Cal. Jur. 356; 1 Am. Jur. 565, 566.

McK. Dig. References: [1] Shipping, § 8; [2] Workmen's Compensation, § 60(1).

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Petitioner contends that this language indicates that "Congress made clear its purpose to permit state compensation protection whenever possible . . ." (*Davis v. Department of Labor, etc.*, 317 U.S. 249, 252 [63 S.Ct. 225, 87 L.Ed. 246]), and states the question presented for decision as follows: "Only if the state could not constitutionally provide compensation for petitioner's injuries, may the order of respondent Commission be sustained."

[1] It is well settled that ". . . contracts for the building of vessels or ships, or for labor performed, or materials furnished, in their construction, are *not* maritime contracts and *not* cognizable in admiralty, . . ." but that "*After a vessel has been completed and put in commission, contracts . . . to repair her . . . are maritime in their nature. . . .*" (1 Am.Jur. pp. 565-566; *New Bedford Dry Dock Co. v. Purdy*, 258 U.S. 96 [42 S.Ct. 243, 66 L.Ed. 482].) (Emphasis added.)

The "Moultrie" was in commission and undergoing repairs hence the work on her was being done under a maritime contract.

[2] In developing their contention that this case is within the state and not the federal act, counsel for petitioner argue that Baskin was not a carpenter; that he did nothing [fol. 132] by way of attaching or affixing lumber or other materials to the structure of the vessel, but was a mere helper carrying planks from one hold to another, where a skilled joiner was to make them a part of the ship. The answer to this is that he was just as much engaged in the performance of his employer's maritime contract as was the joiner who did the carpentry, albeit of humbler station.

With respect to the difference in status, noted above, between a ship under construction and a commissioned ship under repair, petitioner points out that he was paid at two different rates, i. e., $1.20 an hour while on "new construction" and $1.34 while on repair work, and that on the day of his injury he was paid at the "new construction" rate. This is urged in aid of petitioner's broader point that his work was nonmaritime, local and predominantly on shore; that his infrequent assignments to ships under repair were of but a quarter-hour to an hour's duration, hence that his work on shipboard when injured was a mere deviation from his regular nonmaritime shore job, bringing the case within the *de minimis* rule.

Substantially the same argument was considered in *Parker v. Motor Boat Sales, Inc.*, 314 U.S. 244 [62 S.Ct. 221, 86 L.Ed. 184], where the employee's duties were likewise habitually ashore. There the employee had been cautioned not to board the boats. He did so, however, and drowned. The court said: "This proposition cannot be rested on the ground that Armistead, hired primarily as a janitor and porter, was predominantly a non-maritime employee. For habitual performance of other and different duties on land cannot alter the fact that at the time of the accident he was riding in a boat on a navigable river, and it is in connection with that clearly maritime activity that the award was here made. Cf. *Northern Coal & Dock Co. v. Strand*, 278 U.S. 142, 144, 73 L.Ed. 232, 234, 49 S.Ct. 88, 28 N.C.C.A. 18; *Employers' Liability Assur. Corp.* v. *Cook*, 281 U.S. 233, 236, 74 L.Ed. 823, 824, 50 S.Ct. 308. Moreover, sec 2(4) of the Act, 33 U.S.C.A. sec 902(4), expressly provides for its application to 'employees [who] are employed . . . in whole or *in part* upon the navigable waters of the United States.' "

In the Strand case, *supra*, the court said: "The fact that Strand worked for the major portion of the time upon land is unimportant. He was upon the water in pursuit of his maritime duties when the accident occurred." And in the Cook case, *supra*, it is said: "Whether Cook's employment contemplated that he should work regularly in unloading [fol. 133] vessels or only when specially directed so to do is not important. The unloading of a ship is not matter of purely local concern as we have often pointed out."

Ex parte Rosengrant, 213 Ala. 202 [104 So. 409] (affirmed without opinion in *Rosengrant etc.* v. *Havard*, 273 U.S. 664 [47 S.Ct. 454, 71 L.Ed. 829]), is also cited in support of the argument that Baskin was a land and not a sea employee and that his work was not maritime in character. Havard, a lumberyard employee, was checking lumber aboard a barge when killed. The court held that his work was nonmaritime in character and might just as well have been done ashore. The same reasoning applies to *Teahan* v. *Industrial Accident Commission*, 210 Cal. 342 [292 P. 120] (relied on by petitioner) and distinguishes it from the instant case. There Teahan, a wharfinger, was injured while momentarily on shipboard getting the ship's manifest. He was purely a volunteer, as his duties did not require him to leave the wharf. Neither case is in point. Baskin was clearly engaged in the

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performance of a maritime contract at the time of injury, which was not the case with either Havard or Tehan. (See discussion of Teahan case in *Clark* v. *Cahill Bros.*, 67 Cal. App.2d 689 at 694, 696 [155 P.2d 125]).

A case such as the present one is *Norton* v. *Gulf Refining Co.*, 94 F.2d 380, certiorari denied 304 U.S. 566 [58 S.Ct. 949, 82 L.Ed. 1532], where a barge on the Ohio River was being loaded with gasoline drawn from tanks on land. The company's gauger aboard the barge called the pump house and asked that McLane, an assistant, then working ashore be sent to the barge with sample bottles so that samples might be taken of the gasoline being loaded. McLane went aboard with a rack of bottles and while conversing with the gauger for not more than about three minutes an explosion occurred on the barge, fatally injuring both men. The district court held that McLane's employment had no relation to navigation and was nonmaritime, relying on *Rosengrant* v. *Havard, supra.* In reversing, the Circuit Court of Appeals held that "the sampling of gasoline in the barge was necessary before the barge could depart" and distinguished the Rosengrant case, where the lumber company's employee was checking lumber aboard a barge, pointing out that "his checking of the lumber could as well have been done on shore after the lumber left the vessel. There was no necessity for his going on the barge."

The work which Baskin was sent to do could not have been done ashore for the planks were on the ship and the crane's [fol. 134] boom was too short to reach them. In pressing his "on shore duties" argument petitioner goes so far as to say that the ship could have been moved closer shoreward so as to bring her within reach of the boom! And it was apparently as necessary that the work on the hold be done before the ship could sail as was the sampling of the gasoline in the Norton case. McLane had been taken from his shore duties and ordered onto the water; Baskin likewise. In both cases the work on the ship was maritime in character.

Parker v. *Motor Boat Sales, Inc., supra,* is likewise similar to this case on its facts. There one Armistead was employed in the sales company's store as a janitor and porter. On the occasion in question an outboard motor had to be tested on a trial run, and after Armistead had helped to install it the employee in charge asked him to go along as a lookout

to watch for submerged obstacles in the muddy river. The boat hit one of them, capsized, and he drowned. It was held by the Circuit Court of Appeals (116 F.2d 789), as it is urged here, that Armistead's duties were predominantly on shore, local and nonmaritime, but this holding was reversed, the Supreme Court emphasizing the point that the statute applies to persons "employed . . . in whole or *in part* upon the navigable waters of the United States."

The test found in the Teahan case helps to solve the present problem. At 210 Cal. 346 the court adopts the following from *La Casse* v. *Great Lakes Eng. Works*, 242 Mich. 454 [219 N.W. 730, 733]: ". . . (3) If an injury occurs on navigable waters and in the performance of a *maritime* contract, it is certainly within the exclusive jurisdiction of admiralty unless (a) the contract is of merely local concern; and (b) its performance has no direct effect upon navigation or commerce; and (c) the application of the state law 'would not necessarily work material prejudice to any characteristic feature of the general maritime law, or interfere with the proper harmony or uniformity of that law in its international or interstate relations.' (4) State workmen's compensation laws . . . are applicable to *maritime* service on navigable waters, when, and only when, the service is within exceptions (a), (b) and (c) above."

The present case falls within none of these exceptions. (a) There was nothing local about the contract. (b) The repairs to the hold of the "Moultrie" fitted her for the stowage of overseas cargo. "Repairing a completed ship lying in navigable waters has direct and intimate connection with navigation and commerce . . ." (*John Baizley Iron* [fol. 135] *Works et al.* v. *Span*, 281 U.S. 222, 232 [50 S.Ct. 306, 74 L.Ed. 819, 822].) That being so it follows (c) that the application of state law would directly invade the federal jurisdiction.

In addition to the Teahan case petitioner relies chiefly on *Davis* v. *Department of Labor, etc., supra.* The facts of the Norton and Parker cases, *supra*, are clear-cut. With such federal authorities as these and with such others before us as *Great Lakes etc. Co.* v. *Kierjewski*, 261 U.S. 479 [43 S.Ct. 418, 67 L.Ed. 756]; *Gonsalves* v. *Morse etc. Co.*, 266 U.S. 171 [45 S.Ct. 39, 69 L.Ed. 228], *Robins etc. Co.* v. *Dahl*, 226 U.S. 449 [45 S.Ct. 157, 69 L.Ed. 372], and the Span case, in all of which the workmen were injured while making repairs on a

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commissioned ship lying in navigable waters, it is not difficult to distinguish the Davis case from the present one. The following language (317 U.S. 253) shows why that was classified as a "twilight zone" case; "Harbor workers and longshoremen employed 'in whole or in part upon the navigable waters' are clearly protected by this Federal Act; but, *employees such as decedent here* occupy that shadowy area within which, at some undefined and undefinable point, state laws can validly provide compensation." (Emphasis added.) Davis was a structural steel worker employed by a contractor engaged in dismantling an abandoned drawbridge spanning a river in the State of Washington—an obstruction to navigation. The facts are comparable with those in *Millers' Indemnity Underwriters* v. *Braud*, 270 U.S. 59 [46 S.Ct. 194, 70 L.Ed. 470], where the workman was a diver submerged in navigable waters, engaged in sawing off the timbers of an abandoned set of launching ways—an obstruction to navigation. His air supply failed, he died of suffocation and it was held that the matter was "of mere local concern and its regulation by the state will work no material prejudice to any characteristic feature of the general maritime law."

Petitioner's case instead of being in the "twilight zone" is definitely on the same side of the line as the numerous cases (some of them cited herein) which have followed the rule which *Southern Pacific Co.* v. *Jensen*, 244 U.S. 205 [37 S.Ct. 524, 61 L.Ed. 1086, L.R.A. 1918C 451, Ann. Cas. 1917E 900, 14 N.C.C.A. 597], laid down before the present federal compensation law was enacted, but which has been adhered to ever since in cases arising under that act.

Los Angeles etc. Co. v. *Industrial Accident Commission*, 57 Cal.App. 352 [207 P. 416], cited by petitioner, is not in point because there the workman was engaged in the construction of a ship not yet commissioned, hence not in mari- [fol. 136] time employment (1 Am.Jur. 565-566, *supra*). *Grant Smith-Porter Co.* v. *Rohde*, 257 U.S. 469 [42 S.Ct. 157, 66 L.Ed. 321, 25 A.L.R. 1008] was such a case and was followed in 57 Cal.App. at 355.

Numerous authorities both federal and state have been cited by both sides but it is not necessary to discuss them all in view of the authorities cited herein, the facts of which are comparable with those in the present case. It is sufficient to refer to the footnote to the Davis case, 317 U.S. 254, 87 L.

Ed. 249, where scores of cases on both side of the question are cited. That note refers also, for state cases on both sides, to the Circuit Court of Appeals' opinion in the Parker case, 116 F.2d 789. It also refers to the excellent review of the subject, entitled *"Workmen's Compensation and the Maritime Law,"* by Professor Stanley Morrison, in 38 Yale Law Journal, 472-502.

The order of the commission is affirmed.

Nourse, P. J., and Dooling, J., concurred.

[fol. 137] [File endorsement omitted]

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA IN AND FOR THE FIRST APPELLATE DISTRICT, DIVISION TWO

No. 13,927

R. F. BASKIN, etc.

vs.

INDUSTRIAL ACCIDENT COMMISSION, etc.

ORDER DENYING PETITION FOR REHEARING—February 10, 1949

By the COURT:

The Petition for a Rehearing filed in the above entitled cause is hereby denied.

Dated February 10 1949.

Goodell, Acting P. J.

[fol. 138] [Stamp:] Filed Mar. 10, 1949. Walter S. Chisholm, Clerk, by ——, Deputy

Order Due: March 12, 1949.

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

BASKIN

vs.

INDUSTRIAL ACCIDENT COMMISSION ETC., ET AL
(KAISER CO., INC., ET AL)

By the COURT:

ORDER DENYING HEARING AFTER JUDGMENT BY DISTRICT COURT OF APPEAL, 1ST DISTRICT, DIVISION 2, CIVIL NO. 13927

Petition for a hearing Denied.
Carter J., voting for a hearing.
Dated Mar. 10, 1949.

Gibson, Chief Justice.

Filed Mar. 10, 1949. William I. Sullivan, by —— ——, sf. Deputy.

I, William I. Sullivan, Clerk of the Supreme Court of the State of California, do hereby certify that the preceding is a true copy of an order of this Court, as shown by the records of my office.

Witness my hand and the seal of the Court this 10 day of March A.D. 1949.

William I. Sullivan, Clerk, by L. F. White, Deputy Clerk.

[fol. 139] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 140] [Stamp:] Office of the Clerk, Supreme Court, U. S., May 31, 1949

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1948

No. —

BASKIN, Petitioner,

vs.

INDUSTRIAL ACCIDENT COMMISSION

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon consideration of the application of counsel for petitioner,

It is ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including July 8, 1949.

Wm. O. Douglas, Associate Justice of the Supreme Court of the United States.

Dated this 28th day of May, 1949.

[fol. 141] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1949

No. —

BASKIN, Petitioner,

vs.

INDUSTRIAL ACCIDENT COMMISSION

ORDER EXTENDING TIME TO FILE PEITTION FOR WRIT OF CERTIORARI

Upon consideration of the application of counsel for petitioner,

It is ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including August 1, 1949.

Robert H. Jackson, Associate Justice of the Supreme Court of the United States.

Dated this 6th day of July, 1949.

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1949

Office - Supreme Court, U. S.
FILED
JUL 30 1949
CHARLES ELMORE CROPLEY
CLERK

No. 224

REUBEN FRANKLIN BASKIN, by his guardian ad litem and trustee, Catherine Dunn,
Petitioner,

vs.

INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA, KAISER COMPANY, INC., and HARTFORD ACCIDENT & INDEMNITY COMPANY,
Respondents.

PETITION FOR WRIT OF CERTIORARI
to the District Court of Appeal of the State of California, First Appellate District, Division Two
and
BRIEF IN SUPPORT THEREOF.

FRANKLIN C. STARK.
801 Financial Center Building, Oakland 12, California,
Attorney for Petitioner.

STARK & CHAMPLIN,
801 Financial Center Building, Oakland 12, California,

SAMUEL B. HOROVITZ,
6 Beacon Street, Boston 8, Massachusetts,

NATIONAL ASSOCIATION OF CLAIMANTS' COMPENSATION ATTORNEYS,
6 Beacon Street, Boston 8, Massachusetts,

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OCTOBER TERM, 1949

No.

REUBEN FRANKLIN BASKIN, by his guardian ad litem and trustee, Catherine Dunn,
Petitioner,

vs.

INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA, KAISER COMPANY, INC., and HARTFORD ACCIDENT & INDEMNITY COMPANY,
Respondents.

PETITION FOR WRIT OF CERTIORARI
to the District Court of Appeal of the State of California, First Appellate District, Division Two.

To the Honorable Fred M. Vinson, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Your petitioner, Reuben Franklin Baskin, by his guardian ad litem and trustee, Catherine Dunn, prays

that a writ of certiorari issue to review the judgment entered January 11, 1949, in the District Court of Appeal of the State of California, First Appellate District, Division Two, in the above entitled cause. (R. 92-98.) Hearing thereon was denied by the Supreme Court of California on March 10, 1949. (R. 99.) Time within which to file a petition for certiorari herein has been extended by orders of this Court to August 1, 1949. (R. 100.)

SUMMARY STATEMENT OF THE MATTER INVOLVED.

Petitioner filed, with respondent Industrial Accident Commission of the State of California, his claim for compensation under the California Workmen's Compensation Act [*Labor Code*, §§ 3201-6149 (Deering's 1943)] for accidental injuries occurring on December 10, 1945, while he was employed by respondent Kaiser Company, Inc., in Richmond, California, and resulting in his total and permanent disability, both physically and mentally. (R. 2-3.)

His claim was dismissed for want of jurisdiction by respondent Commission on March 31, 1948, on the sole ground that "The claim asserted herein is within the exclusive admiralty jurisdiction of the Federal Government and therefore outside the scope of jurisdiction of the California Industrial Accident Commission". (R. 87.)

A petition for rehearing, filed before the respondent Commission, was denied by order thereof entered June 17, 1948. (R. 91.)

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A writ of review was granted petitioner by the District Court of Appeal of the State of California, First Appellate District, Division Two. The question presented to that Court for decision was stated to be as follows: "Only if the state could not constitutionally provide compensation for petitioner's injuries, may the order of respondent Commission be sustained". (R. 93.) On January 11, 1949, the Court held "* * * that the application of state law would directly invade the federal jurisdiction" (R. 96), and affirmed the order of the Commission. (R. 98.) A petition for rehearing by that Court was denied February 10, 1949. (R. 98.)

The Supreme Court of the State of California thereafter and on March 10, 1949, denied a petition for hearing therein, one justice voting for a hearing. (R. 99.)

There is no dispute over the facts relating to the matter presented in this petition. They are summarized by the District Court of Appeal as follows (R. 92):

> "Petitioner was a materialman employed from March, 1943, until December 10, 1945, by respondent Kaiser Company, Inc., at its Shipyard No. 3. His work during that time was entirely on shore (or on ships under construction) with the exception of two or three tours of short duration when he was sent to work aboard ships being repaired.
>
> "On December 10, 1945, the S.S. 'William Moultrie' was undergoing repairs. She was one of three vessels tied up side by side at the shipyard wharf

in San Francisco Bay and was the farthest out. A crane on the wharf moved materials from place to place on these ships. One of the holds on the 'Moultrie' was being repaired. The crane's boom could not reach the planks already on board, to move them from one hold to another, and it became necessary to send men aboard to do so. Despite standing instructions that Baskin should not be sent aboard ships under repair, he was ordered onto the 'Moultrie' to help, and while there fell down a hold and was seriously and permanently injured."

JURISDICTIONAL STATEMENT.

(a) Statutory provision sustaining jurisdiction.

The statute believed to sustain appellate jurisdiction is Tit. 28 U.S.C. § 1257 (3).

(b) State statute, the validity of which is involved.

The State statute under which petitioner claims compensation, and the validity of which as applied is here involved,[1] is the California Workmen's Compensation Act, *Labor Code*, §§ 3201-6149 (Deering's 1943) hereinafter in this petition referred to as the "State Act".

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[1]The District Court of Appeal clearly construed the coverage of this statute to include petitioner, if such was within the reach of the State of California consistently with Article 3, § 2 of the Federal Constitution which extends the jurisdiction of Federal Courts "to all cases of admiralty and maritime jurisdiction", and the Federal Longshoremen and Harbor Workers' Act, 44 Stats. 1424, 33 U.S.C. § § 901-950, which accepts the constitutional line of demarcation between state and federal jurisdiction. See discussion, infra, as to the nature of the case and the rulings below.

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The provisions of the State Act are:

> "* * * an expression of the police power and are intended to make effective and apply to a complete system of workmen's compensation, the provisions of sections 17½ and 21 of Article XX of the Constitution of this State." *Labor Code,* § 3201 (Deering's 1943).

It is further provided that:

> "Liability for the compensation * * * shall, without regard to negligence, exist against an employer for any injury sustained by his employees arising out of and in the course of his employment * * *" *Labor Code,* § 3600 (Deering's 1943).
>
> * * *
>
> "The provisions [of the State Act] * * * shall be liberally construed by the courts with the purpose of extending their benefits for the protection of persons injured in the course of their employment." *Labor Code,* § 3202 (Deering's 1943).

Section 21 of Article XX of the Constitution of the State of California, applied by the State Act, provides that:[2]

> "The Legislature is hereby expressly vested with plenary power, unlimited by any provision of this Constitution, to create, and enforce a complete system of workmen's compensation, by appropriate legislation, and in that behalf to create and enforce a liability on the part of any and all persons to compensate any and all workmen for in-

[2]Sections 17½ and 21 of Article XX of the Constitution of the State of California are set out in full in Appendix A of the brief attached hereto.

jury or disability, and their dependents for death incurred or sustained by the said workmen in the course of their employment, irrespective of the fault of any party."

(c) Date of judgment sought to be reviewed.

The date of the judgment of the District Court of Appeal sought to be reviewed is January 11, 1949. (R. 92-98.) The Supreme Court of California denied petition for hearing of the matter on March 10, 1949. (R. 99.) Time within which to file petition for certiorari herein has been extended to August 1, 1949. (R. 100.)

(d) Nature of the case and the rulings below.

Petitioner's claim for compensation under the State Act was made in the belief that although his injuries were sustained in the furtherance of repair work on a vessel on navigable waters, nevertheless since he was engaged in an ordinary land occupation and aboard the vessel only casually, he was not deprived of the helpful provisions of the State Act, which contains no limit on recovery in cases of permanent total disability.[3]

Following the injury, the employer's insurance carrier (respondent Hartford Accident & Indemnity Company) paid compensation to petitioner under the

[3]Where the injury causes permanent total disability, the State Act permits the workman to receive 65% of his average weekly earnings for 240 weeks, and thereafter, 40% of his average weekly earnings for the remainder of his life. Average weekly earnings are to be taken at not less than $15.00 nor more than $46.16. Petitioner was earning more than the maximum, so his lifetime pension would on this basis be $18.46 per week.

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Federal Longshoremen and Harbor Workers' Act, 44 Stats. 1424, 33 U.S.C. §§ 901-950 (hereinafter in this petition referred to as the "Federal Act"). The Federal Act by its terms limits total recovery to $7500, even though there may be permanent total disability or death. [33 U.S.C., § 914(m)].[4] Petitioner at no time filed any claim under the Federal Act and there was never any hearing, fact-finding or award made under that Act. Respondent carrier had the employer's coverage under both the State Act and the Federal Act, and its decision on December 17, 1945 (7 days after the accident) to pay compensation under the Federal Act was not joined in by petitioner who was then unconscious and not expected to live. (R. 11; 16-17; 60.) Petitioner has accepted the compensation payments made to him, but has consistently asserted throughout his right to compensation under the State Act, and to treat payments made as on account of State benefits.

The federal question involved was specifically raised in all the proceedings below, and the District Court of Appeal directly ruled on it as the only question involved. (R. 92-98.)

Respondent Commission held that:

> "The claim asserted herein is within the exclusive admiralty jurisdiction of the Federal Government and therefore outside the scope of jurisdiction of the California Industrial Accident Commission." (R. 87.)

---

[4]The Federal Act has now been amended to provide that the limitation shall not apply to cases of permanent total disability or death. The amendment is applicable only to injuries occurring after its effective date, namely, June 24, 1948 (see note under 33 U.S.C.A. § 906).

Accordingly, respondent Commission "dismissed for want of jurisdiction". (R. 87.)

The District Court of Appeal stated the question for decision as follows:

> "Only if the state could not constitutionally provide compensation for petitioner's injuries, may the order of respondent Commission be sustained." (R. 93.)

The Court then held "* * * that the application of state law would directly invade the federal jurisdiction" (R. 96), and affirmed the order of the Commission dismissing for want of jurisdiction. (R. 98.)

The Supreme Court of the State of California denied a petition for a hearing therein (R. 99), and the judgment of the District Court of Appeal thus became the final judgment of the highest Court in the State of California in which a decision could be had. The sustaining by that Court of the federal claim against the application of the State Act brings the case directly within 28 U.S.C. § 1257 (3).

(e) Leading case sustaining jurisdiction.

The leading case believed to sustain the jurisdiction of this Court is *Davis v. Department of Labor of Washington* (1942) 317 U.S. 249, 63 S.Ct. 225, 87 L.ed. 246.

QUESTION PRESENTED.

Where a materialman who is engaged in an ordinary land occupation is injured while casually aboard a

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vessel on navigable waters in the furtherance of repair work, may the state constitutionally extend to his permanent total disability the benefits of its workmen's compensation statute?

REASON RELIED ON FOR THE ALLOWANCE OF THE WRIT.

The District Court of Appeal of the State of California has decided a federal question of substance in a way not in accord with applicable decisions of this Court. The decision of the Court below that the application of the State Act to this case "would directly invade the federal jurisdiction" is in direct conflict with the decisions of this Court in:

Bethlehem Steel Co. v. Arthur J. Moore (1948) 335 U.S. 874, 69 S.Ct. 239, 93 L.ed. 123, aff'g 323 Mass. 462, 80 N.E. (2d) 478;

Davis v. Department of Labor of Washington (1942) 317 U.S. 249, 63 S.Ct. 225, 87 L.ed. 246.

In the *Davis* case, it was determined that there is a presumption of constitutionality attendant upon a state workmen's compensation act which requires a state to take jurisdiction of claims filed in its tribunals when such are in the "twilight zone" between such state acts and the Federal Act.

In the *Bethlehem Steel* case, it was determined that a workman ordinarily employed on land but occasionally going on a vessel to aid in repair work is within the "twilight zone", and thus entitled to the presump-

tion of constitutionality.[5] The *Bethlehem Steel* case decides the exact question which was before the Court below, i.e., whether the "twilight zone" includes occasional acts in furtherance of the repair of a previously finished vessel by one engaged in an ordinary land occupation, diametrically opposite to its determination by that Court.

Dated, Oakland, California,
July 25, 1949.

Respectfully submitted,

REUBEN FRANKLIN BASKIN, by his guardian ad litem and trustee, Catherine Dunn,
Petitioner.

FRANKLIN C. STARK,
Attorney for Petitioner.

STARK & CHAMPLIN,
SAMUEL B. HOROVITZ,
NATIONAL ASSOCIATION OF CLAIMANTS' COMPENSATION ATTORNEYS,
Of Counsel.

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[5]The *Bethlehem Steel* case was decided by this Court in December, 1948, after the matter herein prayed to be reviewed had been submitted to the District Court of Appeal. That Court did not, accordingly, have the benefit of the decision, nor, because of the time element involved, was it available either to it on the petition for rehearing or to the Supreme Court of California on the petition for hearing there. Thereafter, on May 28, 1949, petitioner called this decision to the attention of respondent Commission, but without success.

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vs.

INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA, KAISER COMPANY, INC., and HARTFORD ACCIDENT & INDEMNITY COMPANY,
Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

OPINION OF COURT BELOW.

The opinion of the District Court of Appeal of the State of California, First Appellate District, Division Two (R. 92-98), was filed January 11, 1949 and is reported as *Baskin v. Industrial Accident Commission et al.*, 89 A.C.A. 694, 201 P. (2d) 549.

JURISDICTION.

1. The date of the judgment sought to be reviewed is January 11, 1949. (R. 92-98.) Hearing thereon was denied by the Supreme Court of the State of California on March 10, 1949. (R. 99.) Time within which to file petition for certiorari herein has been extended to and including August 1, 1949. (R. 100.)

2. The statutory provision believed to sustain the jurisdiction of this Court is Tit. 28 U.S.C. § 1257(3).

3. The grounds upon which the jurisdiction of this Court is based and the leading case believed to sustain the jurisdiction of this Court are set forth under the heading "Jurisdictional Statement" in the preceding petition, pages 4 to 8, to which reference is made for the sake of brevity.

STATEMENT OF THE CASE.

For the sake of brevity, we refer to the preceding petition, pages 2 to 4.

STATEMENT OF ERROR.

The District Court of Appeal of the State of California erred in holding that the general admiralty law rendered the California Workmen's Compensation Act, *Labor Code,* §§ 3201-6149 (Deering's 1943) (hereinafter in this brief referred to as the "State Act") inapplicable to petitioner who was engaged in an ordinary land occupation and was injured while

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casually aboard a vessel on navigable waters in the furtherance of certain repair work.

ARGUMENT.

I. THERE IS A PRESUMPTION OF CONSTITUTIONALITY ATTENDANT UPON A STATE WORKMEN'S COMPENSATION ACT WHICH REQUIRES THE STATE TO TAKE JURISDICTION OF CLAIMS FILED IN ITS TRIBUNALS WHEN SUCH ARE WITHIN THE "TWILIGHT ZONE" BETWEEN THE STATE ACT AND THE FEDERAL ACT.

This Court in the case of *Davis v. Department of Labor of Washington*[1] enunciated the rule of a "twilight zone" between state workmen's compensation acts and the Federal Longshoremen and Harbor Workers' Act., 44 Stats. 1424; 33 U.S.C.A. §§ 901-950 (hereinafter in this brief referred to as the "Federal Act"). Faced with the problem of situations in which a case might fall under either such a state act or the Federal Act by reason of particular facts, "we must give great—indeed, presumptive—weight to the conclusions of the appropriate federal authorities and to the state statutes themselves." (317 U. S. at 256).

> "Where there has been a hearing by the federal administrative agency * * * our task proves easy. There we are aided by the provision of the federal act, 33 USCA § 920, which provides that in proceedings under that act, jurisdiction is to be 'presumed in the absence of substantial evidence to the contrary'." (317 U.S. at 256).

"In the instant case [where, as here, the proceedings were under a state act and not the

[1](1942) 317 U.S. 249, 63 S.Ct. 225, 87 L.ed. 246.

Federal Act] we do not enjoy the benefit of federal administrative findings and must therefore look solely to state sources for guidance. We find here a state statute which purports to cover these persons, and which indeed does cover them if the doubtful and difficult factual questions to which we have referred are decided on the side of the constitutional power of the state." (317 U.S. at 257).

"Under all the circumstances of this case [*Davis*] we will rely on the presumption of constitutionality in favor of this state enactment; for any contrary decision results in our holding the Washington act unconstitutional as applied to this petitioner. A conclusion of unconstitutionality of a state statute can not be rested on so hazardous a factual foundation here, any more than in the other cases cited." (317 U.S. at 258).

II. A WORKMAN ENGAGED IN AN ORDINARY LAND OCCUPATION BUT INJURED WHILE CASUALLY ABOARD A VESSEL ON NAVIGABLE WATERS IN THE FURTHERANCE OF REPAIR WORK IS IN THE "TWILIGHT ZONE".

The basic question presented by this case is whether the "twilight zone" includes a land workman like petitioner whose momentary presence aboard a vessel on navigable waters in furtherance of repair is incidental and *de minimis* in the extreme. The Court below held it did not.

The precise point has now been decided to the contrary by this Court, in the recent case of *Bethlehem*

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Steel Co. v. Arthur J. Moore.[2] It was there held in a per curiam opinion affirming the Supreme Judicial Court of Massachusetts,[3] that such a workman was within the "twilight zone" and entitled to compensation under a state workmen's compensation act. Both Courts rested their decision on the *Davis* case. That case and the *Bethelehem Steel* case require reversal of the Court below.

In the *Bethlehem Steel* case, the injured workman was a rigger who spent the major portion of his time on the piers but occasionally went aboard vessels. At the time of injury he was aboard a vessel on navigable waters, engaged in furthering its repair. The Supreme Judicial Court of Massachusetts, whose judgment was affirmed by this Court, carefully pointed out that, prior to the *Davis* case, it would have reached the opposite result under *Southern Pacific Co. v. Jensen* (1917) 244 U.S. 205, 37 S.Ct. 524, 61 L.ed. 1086. The Massachusetts Court concluded, however, that:

> "* * * the situation was definitely altered by the decision of the Supreme Court of the United States in Davis v. Department of Labor * * *" (80 N. E. (2d) at 480.)

and that there was now included:

> "* * * within the twilight zone the case of a workman engaged in an ordinary land occupation although occasionally going upon a dry dock or vessel to make repairs." (80 N.E. (2d) at 481).

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[2](December, 1948) 335 U.S. 874, 69 S.Ct. 239, 93 L.ed. 123, aff'g. 323 Mass. 462, 80 N.E. (2d) 478.

[3]*Moore's Case* (S. J. Ct. Mass., 1948) 323 Mass. 462, 80 N.E. (2d) 478.

In the light of the *Davis* and *Bethlehem Steel* cases, petitioner was clearly entitled to his choice of the State Act to compensate his permanent total disability. It has been properly said of the decision below that:[4]

> "The court did not refer to the recent case decided by the Massachusetts Supreme Judicial Court and affirmed by the Supreme Court of the United States, Moore's Case, 323 Mass. 462, 80 N.E. 2d 478, affirmed, 69 S.Ct. 239 (Dec. 6, 1948). It cited primarily older cases decided before the leading case of Davis v. Dept. of Labor, 317 U.S. 249, 63 S.Ct. 225 (1942), and disposed of that case with the finding that the petitioner did not bring himself within the twilight zone. A materialman is certainly not a longshoreman. He is hardly a harbor worker when his work was entirely on shore, except for 'two or three tours of short duration when he was sent to work aboard ships being repaired'. 'Harbor' workers connote regular work on boats in harbors, not on land. At least, there is doubt, and the twilight zone doctrine should have given the plaintiff his choice."

III. THE COURT BELOW ERRED IN FAILING TO RECOGNIZE THE PRESUMPTION OF CONSTITUTIONALITY IN FAVOR OF THE STATE ACT, AND IN DETERMINING THE MATTER BY REFERENCE SOLELY TO FEDERAL SOURCES RATHER THAN SOLELY TO STATE SOURCES.

The Court below posed the question for decision as "Only if the state could not constitutionally provide

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[4] 3 NACCA Law J. 170-171. See also 17 Geo. Wash. L. Rev. 391-393; 33 Minn. Law Rev. 421-423.

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compensation for petitioner's injuries, may the order of respondent Commission be sustained." (R. 93.) There is no specific reference to the state statute involved nor to the federal constitutional provision against which its validity is to be measured. It is clearly assumed throughout, however, as is the fact, that the State Act covers petitioner. Reference to the State Act shows that its provisions are:

> "**** an expression of the police power and are intended to make effective and apply to a complete system of workmen's compensation, the provisions of Sections 17½ and 21 of Article XX of the Constitution of this State."[5] *Labor Code,* § 3201 (Deering's 1943).

It is clearly stated, moreover, that the validity of the State Act is being measured against "the federal jurisdiction" (R. 96), which may be taken as a reference both to Article 3, § 2 of the Federal Constitution, which extends the jurisdiction of Federal Courts "to all cases of admiralty and maritime jurisdiction", and to the Federal Act which accepts the constitutional line of demarcation between state and federal jurisdiction.[6]

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[5]Section 21 of Article XX of the Constitution of the State of California provides that:

> "The Legislature is hereby expressly vested with plenary power, unlimited by any provision of this Constitution to create and enforce a liability on the part of any and all persons to compensate any and all workmen * * *"

See also Paragraph (b) under Jurisdictional Statement in the petition to which this brief is attached, and Appendix A hereto for Sections 17½ and 21 of Article XX in full.

[6]*Davis v. Department of Labor of Washington* (1942) 317 U.S. 249, 256, 63 S.Ct. 225, 87 L.ed. 246, 250.

The Court below failed to recognize that petitioner was within the "twilight zone", saying expressly:

> "Petitioner's case instead of being in the 'twilight zone' is definitely on the same side of the line as the numerous cases * * * which have followed the rule which *Southern Pacific Co. v. Jensen* * * * laid down * * *" (R. 97.)

Inasmuch as petitioner's case is in the "twilight zone", as the *Bethlehem Steel* case makes abundantly clear, the Court below was required to extend to him the "presumptive weight" (317 U.S. at 256) of the State Act itself, and to "look solely to state sources for guidance" (317 U.S. at 257) in determining the constitutional problem. It did neither. Instead of recognizing a presumption of constitutionality of the State Act (in fact such is never even mentioned) and looking solely to state sources for guidance in deciding the constitutional question, the Court below determined the question by reference to the Federal Act and to decisions under the Federal Act which of necessity rest on the statutory presumption of federal jurisdiction contained in that Act itself.

Thus, the Court below, in treating the factual situation of a land employee only casually aboard a vessel, notes that "Substantially the same argument was considered in *Parker v. Motor Boat Sales, Inc.*, 314 U. S. 244 [62 S. Ct. 221, 86 L. Ed. 184] * * *" (R. 94), in which case an exercise of federal jurisdiction was sustained. There was no recognition by the Court below that the *Parker* case, as explained in the *Davis* case, rests on the statutory presumption of federal jurisdiction, certain particular facts in that

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case being sufficient to sustain the action of the federal administrative agency. That being so, the *Parker* case may not be taken as controlling a factual situation presented not to such a federal agency but to a state tribunal. The use of this authority was not "Giving the full weight to the presumption [of the constitutionality of the State Act] and resolving all doubts in favor of the [State] Act" (317 U.S. at 258). It was instead thrusting the burden of a presumption of federal jurisdiction upon petitioner, even though he was not claiming under the Federal Act.

This misconception of the law perpetuated the error of the trial referee who had likewise determined on the basis of the *Parker* case that petitioner's status as a land employee and the casual and *de minimis* character of his presence aboard the vessel were immaterial on the jurisdictional question.[7]

That the *Parker* case may not be so viewed, is explained by this Court in the *Davis* case, where it was said of *Parker:*

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[7]See Trial Referee's Report on Applicant's Petition for Rehearing (R. 88):

"But there are additional facts which could conceivably distinguish this case from the usual 'repair' case. The applicant in this case did not usually or customarily work in the repair of vessels; on the contrary, he was predominantly a land employee, and it was only on rare occasions and for short periods of time that he was assigned tasks on board ship; and furthermore, this general assignment to work on land was by deliberate design of the supervisory authority. What significance have these additional facts on the jurisdictional question?

"I think it is clear that they have none. Maritime service is no less maritime because it is performed at rare intervals, or by a workman who is better suited for work on land.

"Parker v. Motor Boat Sales, Inc., 314 U.S. 244 is directly in point * * *"

"* * * we must give great—indeed, presumptive—weight to the conclusions of the appropriate federal authorities * * * Where there has been a hearing by the federal administrative agency entrusted with broad powers of investigation, fact finding, determination and award, our task proves easy. There we are aided by the provisions of the federal act, 33 U.S.C.A. 920, which provides that in proceedings under that act, jurisdiction is to be presumed in the absence of substantial evidence to the contrary. Fact findings of the agency, where supported by the evidence, are made final. Their conclusion that a case falls within the federal jurisdiction is therefore entitled to great weight and will be rejected only in cases of apparent error. *It was under these circumstances that we sustained the Commissioner's findings in Parker v. Motor Boat Sales, supra.*"[8]

CONCLUSION.

The decision of the District Court of Appeal is clearly not in accord with controlling decisions of this Court. Its failure to recognize that petitioner is within the "twilight zone" frustrates the very purpose of the *Davis* case to free the injured employee from doubt as to which act covers his disability and to permit him to choose, and be right in his choice.

Petitioner is a young man who has been totally and permanently disabled for life. The State Act under which he admittedly worked day in and day out for almost three years for respondent employer provides

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[8]Italics supplied.

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lifetime compensation for his permanent total disability. This feature of the Act was designed expressly to compensate those who, like him, sustain such disability while industrially employed.

Petitioner has sought with all the means at his disposal to secure his award under the State Act, relying on this Court's enunciation of the "twilight zone" doctrine in the *Davis* case. The applicability of that doctrine to his situation has become perfectly clear since this Court's decision in the *Bethlehem Steel* case, a decision not available to the state tribunals at the time petitioner's case was before them.

We respectfully submit that certiorari should be granted herein, and the judgment below reversed on the basis of the *Davis* and *Bethlehem Steel* cases.

Dated, Oakland, California,
July 25, 1949.

Respectfully submitted,
FRANKLIN C. STARK,
Attorney for Petitioner.

STARK & CHAMPLIN,
SAMUEL B. HOROVITZ,
NATIONAL ASSOCIATION OF CLAIMANTS' COMPENSATION ATTORNEYS,
Of Counsel.

(Appendix A Follows.)

Appendix A

EXCERPTS FROM ARTICLE XX OF THE CONSTITUTION OF THE STATE OF CALIFORNIA.

"Sec. 17½. The Legislature may, by appropriate legislation, provide for the establishment of a minimum wage for women and minors and may provide for the comfort, health, safety and general welfare of any and all employees. No provision of this Constitution shall be construed as a limitation upon the authority of the Legislature to confer upon any commission now or hereafter created, such power and authority as the Legislature may deem requisite to carry out the provisions of this section."

"Sec. 21. The Legislature is hereby expressly vested with plenary power, unlimited by any provision of this Constitution, to create, and enforce a complete system of workmen's compensation, by appropriate legislation, and in that behalf to create and enforce a liability on the part of any or all persons to compensate any or all of their workmen for injury or disability, and their dependents for death incurred or sustained by the said workmen in the course of their employment, irrespective of the fault of any party. A complete system of workmen's compensation includes adequate provisions for the comfort, health and safety and general welfare of any and all workmen and those dependent upon them for support to the extent of relieving from the consequences of any injury or death incurred or sustained by workmen in the course of their employment, irrespective of the fault of any

party; also full provision for securing safety in places of employment; full provision for such medical, surgical, hospital and other remedial treatment as is requisite to cure and relieve from the effects of such injury; full provision for adequate insurance coverage against liability to pay or furnish compensation; full provision for regulating such insurance coverage in all its aspects, including the establishment and management of a State compensation insurance fund; full provision for otherwise securing the payment of compensation; and full provision for vesting power, authority and jurisdiction in an administrative body with all the requisite governmental functions to determine any dispute or matter arising under such legislation, to the end that the administration of such legislation shall accomplish substantial justice in all cases expeditiously, inexpensively, and without incumbrance of any character; all of which matters are expressly declared to be the social public policy of this State, binding upon all departments of the State government.

The Legislature is vested with plenary powers, to provide for the settlement of any disputes arising under such legislation by arbitration, or by an industrial accident commission, by the courts, or by either, any, or all of these agencies, either separately or in combination, and may fix and control the method and manner of trial of any such dispute, the rules of evidence and the manner of review of decisions rendered by the tribunal or tribunals designated by it; provided, that all decisions of any such tribunal shall

be subject to review by the appellate courts of this State. The Legislature may combine in one statute all the provisions for a complete system of workmen's compensation, as herein defined.

Nothing contained herein shall be taken or construed to impair or render ineffectual in any measure the creation and existence of the industrial accident commission of this State or the State compensation insurance fund, the creation and existence of which, with all the functions vested in them, are hereby ratified and confirmed."

In the Supreme Court
OF THE
United States

Supreme Court, U. S.
FILED
SEP 2 - 1949
CHARLES ELMORE CROPLEY
CLERK

OCTOBER TERM, 1949

No. 224

REUBEN FRANKLIN BASKIN, by his guardian ad litem and trustee, Catherine Dunn,
Petitioner,

vs.

INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA, KAISER COMPANY, INC., and HARTFORD ACCIDENT & INDEMNITY COMPANY,
Respondents.

BRIEF FOR RESPONDENTS KAISER COMPANY, INC., AND HARTFORD ACCIDENT & INDEMNITY COMPANY, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

OLIVER DIBBLE,
Mills Building, San Francisco 4,
Counsel for said Respondents.

R. P. WISECARVER,
315 Montgomery Street, San Francisco 4,

HERBERT CHAMBERLIN,
Russ Building, San Francisco 4,
Of Counsel.

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In the Supreme Court
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OPINIONS BELOW.

The opinion of the District Court of Appeal of the State of California, First Appellate District, Division Two, is reported as Baskin v. Ind. Acc. Com., 89 A. C. A. 694, 201 P. 2d 549. It is printed in the record. R 92-98. No opinion was rendered by the Supreme Court of the State of California in denying a hearing.

JURISDICTION.

These respondents question certiorari jurisdiction. A special argument respecting jurisdiction is made in a later part of the brief.

QUESTIONS INVOLVED.

1. Whether the petition shows a case within the certiorari jurisdiction of this Court.

2. Whether, assuming certiorari jurisdiction, the petition shows a substantial question.

STATEMENT.

The record is concerned with the case of a workman whose employment was maritime and whose injury occurred on navigable waters. Petitioner Baskin was a member of a gang employed to repair the William Moultrie, a completed ship. R 19, 33-35, 51. In the course of his employment, and while working on the

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ship on navigable waters, he fell into the ship's hold and was injured on December 10, 1945. R 58, 83.

The fact of injury was duly reported to the Federal Deputy Commissioner of the Thirteenth Compensation District on the prescribed forms. R 5, 12. Medical attention was provided and compensation indemnity paid in accordance with the provisions of the Longshoremen's and Harbor Workers' Act, 33 U.S.C.A., sec. 901 et seq. R 14-16. Baskin's sister, his present guardian ad litem, looked after his affairs. R 66. She and a representative of the insurance carrier of the employer discussed a proposed commutation or settlement of the amounts due under the said Act, but the deputy commissioner disapproved the commutation. R 9-10.

The present proceedings were thereafter instituted before the Industrial Accident Commission of the State of California and benefits claimed under the state workmen's compensation laws. R 2. The proceedings were dismissed by the commission on March 29, 1949, for want of jurisdiction. R. 87. On January 11, 1949, the District Court of Appeal of the State of California affirmed the order and award of the commission. R 92. It denied a rehearing on February 10, 1949. R 98. And the Supreme Court of the State of California, without opinion, denied a hearing on March 10, 1949. R 99.

ARGUMENT.

(1) REVIEW OF THE DECISION OF THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA SHOULD BE DENIED, FOR THE REASON THAT THE PETITION DOES NOT SHOW A CASE WITHIN THE CERTIORARI JURISDICTION OF THIS COURT.

Petitioner asserts jurisdiction under 28 U.S.C.A., sec. 1257 (3). Pet. 4. The third subdivision of the section has three clauses. It is plain that petitioner is relying on the second clause which confers certiorari jurisdiction "where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution . . . of the United States". The scope of petitioner's assertion is that the District Court of Appeal held the workmen's compensation laws of California to be repugnant to section 2 of article 3 of the federal constitution granting admiralty and maritime jurisdiction to the federal government and depriving states of power to enlarge or restrict it. But the District Court of Appeal did not make a holding of that character. What the court held in the case before it, where maritime employment and maritime injury concurred, was that the state workmen's compensation laws were consistent with said section 2 of article 3 and are to be construed in accordance with the interpretation given those constitutional provisions by this Court in *Southern Pacific Co. v. Jensen,* 244 U.S. 205. No other construction was open to the District Court of Appeal, for the Supreme Court of California has uniformly held that where maritime employment and maritime injury concur, the workmen's compensation laws of California are to be

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construed according to the principles declared in the *Jensen* case. *Sudden & Christenson v. Ind. Acc. Com.*, 182 Cal. 437, 438; *Occidental Indemnity Co. v. Ind. Acc. Com.*, 24 Cal. 2d 310, 313. As an intermediate court, the District Court of Appeal is bound by the decisions of the Supreme Court of California and must accept its construction of state laws. *Estate of Fleishman*, 62 Cal. App. 2d 588. That is all that the District Court of Appeal did in the present case. And it is well settled that the construction given a state law by a state court is binding on the Supreme Court of the United States. As the petition herein merely seeks to disturb construction of that character, it follows that certiorari jurisdiction is lacking and the petition for writ of certiorari should be denied. *Red Cross Lines v. Atlantic Fruit Co.*, 264 U.S. 109, 120; *Ward & Gow v. Kripsky*, 259 U.S. 503, 510; *Quong Ham Wah Co. v. Ind. Acc. Com.*, 255 U.S. 445, 448-449.

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(2) REVIEW OF THE DECISION OF THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA SHOULD BE DENIED, FOR THE REASON THAT, ASSUMING CERTIORARI JURISDICTION, THE PETITION DOES NOT SHOW A SUBSTANTIAL QUESTION.

A contract to repair a completed ship is traditionally maritime, and as a member of the repair gang petitioner's employment was unquestionably maritime. *Baizley Iron Works v. Spam*, 281 U.S. 222; *Northern Coal & Dock Co. v. Strand*, 278 U.S. 142; *Mesel v. Foundation Co.*, 274 U.S. 427; *Robins Dry Dock etc.*

Co. v. Dahl, 266 U.S. 449; *Gonzales v. Morris Dry Dock etc. Co.,* 266 U.S. 171; *Great Lakes etc. Co. v. Kierejewski,* 261 U.S. 470; *New Bedford Dry Dock Co. v. Purdy,* 258 U.S. 9; *Grant etc. Ship Co. v. Rohde,* 257 U.S. 469.

In cases like the present, where maritime employment and maritime injury concur, *Southern Pacific Co. v. Jensen,* 244 U.S. 205, settled the law that state workmen's compensation laws may not intrude. And in cases where those two elements combine this Court has adhered to the *Jensen* decision. *Knickerbocker Ice Co. v. Stewart,* 253 U.S. 149; *Washington v. Dawson & Co.,* 264 U.S. 219; *Employers' Liability Assur. Corp. v. Cook,* 281 U.S. 233; *Parker v. Motor Boat Sales, Inc.,* 314 U.S. 244.

Here the workman was engaged in the repair, between voyages, of the hold of an ocean going commissioned steamship while lying on navigable waters of the United States.

It has long ceased to be a substantial question whether state workmen's compensation laws may intrude in cases of the present type. The Longshoremen's and Harbor Workers' Compensation Act is appropriate to give full relief in such cases, and the facts in the record show that petitioner is getting that relief.

Petitioner relies heavily on *Davis v. Department of Labor,* 317 U.S. 249, and *Bethlehem Steel Co. v. Moore,* 335 U.S. 874. In neither case did maritime employment and maritime injury concur. Each merely

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had some amphibious characteristic. In the *Davis* case the injury was maritime but the employment was not. Davis was a structural steel worker employed in dismantling a bridge—a nonmaritime employment. He was killed when he fell or was knocked into the water—a maritime injury. The same is true of the *Bethlehem* case. The injured party was employed on a land based crane bringing materials to a ship—a nonmaritime employment. Injury occurred when he stepped aboard a ship in navigable waters—a maritime injury. It is therefore clear that neither case is in point.

An overstatement in the footnote at page 10 of the petition needs correcting. Petitioner says that "because of the time element involved" the *Bethlehem* case could not be made available to the state appellate courts. Petitioner is mistaken. He had plenty of time. The decision by the Massachusetts court in the *Bethlehem* case (323 Mass. 462, 80 N.E. 2d 478) was available to him, of course, throughout his entire proceedings in the state courts. This Court decided the *Bethlehem* case on December 6, 1948. The District Court of Appeal did not decide petitioner's case until January 11, 1949 (R 92); it denied a rehearing on February 10, 1949 (R 98); and the state Supreme Court denied a hearing on March 10, 1949 (R 99). From December 6, 1948, to March 10, 1949, petitioner had opportunity to make the *Bethlehem* decision available to the state courts if he deemed it important. His failure to do so must be ascribed to lack of diligence rather than lack of time.

CONCLUSION.

These respondents therefore respectfully submit that the petition for a writ of certiorari should be denied.

Dated, San Francisco,
August 29, 1949.

OLIVER DIBBLE,
Counsel for said Respondents.

R. P. WISECARVER,
HERBERT CHAMBERLIN,
Of Counsel.

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FILED
SEP 6 – 1949
CHARLES ELMORE CROPLEY
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 224

REUBEN FRANKLIN BASKIN, by his guardian ad litem and trustee, Catherine Dunn,

Petitioner,

v.

INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA, KAISER COMPANY, INC., and HARTFORD ACCIDENT & INDEMNITY COMPANY,

Respondents.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

EVERETT A. CORTEN
965 Mission Street
San Francisco 3, California
Attorney for Respondent Industrial Accident Commission of the State of California

T. GROEZINGER
965 Mission Street
San Francisco 3, California
Of Counsel

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In the Supreme Court

OF THE

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BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Comes now the respondent Industrial Accident Commission of the State of California and respectfully submits its brief in opposition to the petition for writ of certiorari filed by Petitioner Reuben Franklin Baskin, by his guardian ad litem and trustee, Catherine Dunn.

Petitioner seeks to review a decision of an intermediate state appellate court of the State of California, which decision affirmed an order of dismissal for want of jurisdiction of petitioner's claim for workmen's compensation benefits made by the Industrial Accident Commission of the State of California.

JURISDICTION

The question presented by this proceeding is undoubtedly within the jurisdiction of the United States Supreme Court. However, as respondent will demonstrate hereinafter, the decision of the California District Court of Appeal affirming an order of dismissal of the State Industrial Accident Commission was in accord with the applicable decisions of the United States Supreme Court and no reason exists for granting the writ of certiorari prayed for by the petitioner.

STATEMENT OF THE CASE

The statement of the case requisite to a determination of the issue presented by petitioner is adequately and correctly set forth at pages 2 through 4 of the petition for writ of certiorari.

SUMMARY OF ARGUMENT

1. Workmen repairing a commissioned vessel in navigable waters are engaged in maritime employment and injuries arising therein are within the exclusive admiralty jurisdiction.

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2. The "twilight zone" rule and the presumption of constitutionality attendant upon a state workmen's compensation statute is inapplicable where said state statute works material prejudice to the characteristic features of the general maritime law.

ARGUMENT

1. Workmen Repairing A Commissioned Vessel In Navigable Waters Are Engaged In Maritime Employment, and Injuries Arising Therein Are Within the Exclusive Admiralty Jurisdiction

The repairing of a commissioned vessel on navigable waters is a maritime contract and those employees who perform the work are engaged in maritime employment.

John Baizley Iron Works v. *Span* 281 U. S. 222, 232, 50 S. Ct. 306, 74 L. Ed. 819;

Robins Drydock & Repair Co. v. *Dahl,* 266 U. S. 449, 45 S. Ct. 157, 69 L. Ed 372;

Great Lakes, etc. Co. v. *Kierejewski,* 261 U. S. 479, 43 S. Ct. 418, 67 L. Ed. 756.

Injuries sustained by an employee in the course of making repairs aboard a commissioned vessel in navigable waters are within the exclusive admiralty jurisdiction in that it has direct and intimate connection with navigation and commerce. State compensation laws may not be applied.

John Baizley Iron Works v. *Span,* 281 U. S. 222, 232, 50 S. Ct. 306, 74 L. Ed. 819;

Messel v. *Foundation Co.,* 274 U. S. 427, 434, 47 S. Ct. 695, 71 L. Ed. 1135;

Robins Dry Dock Co. v. *Dahl,* 266 U. S. 449, 457, 45 S. Ct. 157, 69 L. Ed. 372;
Gonsalves v. *Moore Dry Dock & Repair Co.,* 266 U. S. 171, 172, 45 S. Ct. 39, 69 L. Ed. 228;
Great Lakes Dredge & Dry Dock Co. v. *Kierejewski,* 261 U. S. 479, 480, 481, 43 S. Ct. 418, 67 L. Ed. 756.

Admiralty jurisdiction does not depend on the frequency with which maritime work is performed by the employee. Exclusive admiralty jurisdiction is not ousted by the intermittent nature of maritime employment.

Parker v. *Motor Boat Sales Co.,* 314 U. S. 244, 62 S. Ct. 221, 86 L. Ed. 184;
Liability Assur. Corp. v. *Cook,* 281 U. S. 233, 236, 50 S. Ct. 308, 74 L. Ed. 823;
Northern Coal & Dock Co. v. *Strand,* 278 U. S. 142, 144, 49 S. Ct. 88, 73 L. Ed. 232.

2. The "Twilight Zone" Rule and the Presumption of Constitutionality Attendant Upon A State Workmen's Compensation Statute Is Inapplicable Where Said State Statute Works Material Prejudice to the Characteristic Features of the General Maritime Law

The "twilight zone" rule announced in the case of *Davis* v. *Department of Labor,*[1] founded on the concept of dual presumptions leading to an overlapping of federal and state jurisdictions, relied on by petitioner, has no application where an employee is injured while engaged in repairing a commissioned

[1] 317 U. S. 249, 63 S. Ct. 225, 87 L. Ed. 246.

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vessel in navigable waters. It was pointed out by the Supreme Court in the *Davis* case opinion, at page 252:

> "A line of opinions of this court beginning with *Southern Pacific Co. v. Jensen,* 244 U. S. 205, 216, 37 S. Ct. 524, 529, 61 L. Ed. 1086 . . ., held that under some circumstances states could but under others could not, consistent with Article 111, §2, of the Federal Constitution, apply their compensation laws to maritime employees. *State legislation was declared to be invalid only where it 'works material prejudice to the characteristic features of the general maritime law,* or interferes with the proper harmony and uniformity of that law in its international and interstate relations'." (Italics ours.)

The circumstances under which states cannot, consistent with Article 111, Section 2, of the Federal Constitution, apply their compensation laws to maritime employees, as stated in the *Jensen* case and those that followed it, have never been overruled, and have been reiterated as a correct statement of the law as applied to state workmen's compensation statutes by the United States Supreme Court.

Standard Dredging Corp. v. *Murphy,* 319 U. S. 306, 309, 63 S. Ct. 1067, 1068;
Davis v. *Dept. of Labor,* 317 U. S. 249, 63 S. Ct. 225, 87 L. Ed. 246.

The *Davis* case clearly establishes that the "twilight zone" therein promulgated referred to borderline cases where, from the factual situation involved, the nature and circumstances of the employment fall within the indefinable border marking the end limits

of state jurisdiction on the one side and federal jurisdiction on the other.

> "Harbor workers and longshoremen employed 'in whole or in part upon the navigable waters' are clearly protected by this Federal Act; *but employees such as decedent here occupy that shadowy area within which, at some undefined and indefinable point, state laws can validly provide compensation.*" (Italics ours.)
>
> *Davis* v. *Dept. of Labor, supra,* p. 253.

And at page 256, it was further pointed out that:

> "There is, in the light of the cases referred to, clearly a twilight zone in which the employees must have their rights determined case by case, and in which particular facts and circumstances are vital elements."

The facts of the *Davis* case illustrate the basis upon which the presumption of constitutionality of the state statute was indulged. Those facts are completely at variance with the facts herein. Davis was a structural steel worker engaged in dismantling an abandoned drawbridge which spanned the Snohomish River. The steel when cut from the bridge was lowered to a barge on the river below. Davis' duty was to examine the steel after it was lowered to the barge, and, when necessary, to cut the pieces to proper lengths with an oxyacetylene torch. From this barge he fell or was knocked into the stream in which his body was found.

Davis v. *Dept. of Labor,* 317 U. S. 225, 226, 227, 63 S. Ct. 225, 87 L. Ed. 246.

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The basis for the attempted invoking of admiralty jurisdiction stemmed from the sole fact that the employee's work was being performed on navigable waters and that his death occurred therein. No maritime employment was involved; on the contrary, it was entirely nonmaritime in character.

Petitioner herein was engaged in the repair of a commissioned vessel in maritime waters at the time of his injury, a long-established maritime employment. The California District Court of Appeal properly rejected the "twilight zone" argument as not controlling when it said, (R., 97):

> "Petitioner's case instead of being in the 'twilight zone' is definitely on the same side of the line as the numerous cases (some of them cited herein) which have followed the rule which *Southern Pacific Co. v. Jensen,* * * * laid down before the present federal compensation law was enacted, but which has been adhered to ever since in cases arising under this act."

In the light of the decided cases holding that the work of repairing a commissioned vessel has a direct relation to navigation or commerce, and that the application of state compensation statutes to injuries sustained by workmen while so engaged would work material prejudice to the essential features of the maritime law, there is no basis upon which the presumption of constitutionality of the state statute may be indulged. The constitutional question of "interference with the proper harmony and uniformity of

maritime law" has been decided adversely to state jurisdiction upon the facts presented in this case.

In support of the contention that injuries sustained by an employee while engaged in intermittent maritime employment (repairing a commissioned vessel in navigable waters) fall within the "twilight zone," petitioner refers to the opinion in *Moore's* case[1] and the per curiam decision of this court[2] affirming the judgment in *Moore's* case.[3]

In the *Moore's* case, the court predicated its opinion on an assumption that the *Davis* case was intended to be a *revolutionary decision* including within a wide circle of doubt *all* waterfront cases involving aspects pertaining both to the land and to the sea *where a reasonable argument can be made either way;* that the law was definitely altered by the court's decision in the *Davis* case; and that the occasional presence of a workman in an ordinary land occupation on a vessel to make repairs was within the "twilight zone."[4]

The facts of the case disclose that Moore was aboard a commissioned vessel in navigable waters undergoing repairs, at the time of his injury. However, it further appeared that his work was variously on piers, dry docks and ships at the employer's plant. Some of the time he directed the efforts of other "tag men," fixing

[1] *Moore's* case (S. J. Ct. Mass., 1948), 323 Mass. 462, 80 N. E. (2d) 478.

[2] *Bethlehem Steel Co.* v. *Arthur J. Moore* (December, 1948), 335 U. S. 874, 69 S. Ct. 239, 93 L. Ed. 123, aff'g. 323 Mass. 462, 80 N. E. (2d) 478.

[3] The *Bethlehem Steel* case was decided by this court in December, 1948, after the matter herein prayed to be reviewed had been submitted to the California District Court of Appeal. That court did not, accordingly, have the opportunity to consider the decision, nor, because of the time element involved, was it available either to it on the petition for rehearing or to the Supreme Court of California on the petition for hearing therein.

[4] *Moore's* case 323 Mass. 462, 80 N. E. (2d) 478, at pp. 480-81.

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the hooks which were on the chains of the cranes to material to be moved and directing its movement from piers on land to dry docks or ships. The major portion of his work was on the piers, but occasionally it took him aboard vessels. At the time of his injury, caused by slipping on the step of a gun mount while aboard the vessel, Moore was endeavoring to position himself so that his crane operator could see the signals he was about to make relative to directing the movement of a draft of material.[1]

Thus, it is evident that Moore's presence aboard the vessel was not occasioned by active participation in the general work of repairing the ship itself, but was incident to performing his usual duties normally executed from the pier. His presence aboard a commissioned vessel on navigable waters at the time of injury was in furtherance of his nonmaritime duties. A factual situation identical to that which existed in the *Davis* case.

Thus, although the Massachusetts court founded its decision on the assumption that the employee was engaged in the repair of a commissioned vessel at the time of his injury, the applicability of the "twilight zone" rule and the presumption of constitutionality of the state statute are clearly apparent.

This court's affirmance of *Moore's* case on appeal did not expressly adopt or incorporate the opinion of the Massachusetts court in its decision. To the contrary, this court only affirmed the judgment of the

[1] *Moore's* case, 323 Mass. 402, 80 N. E. (2d) 478, 479.

Massachusetts court, citing *Davis* v. *Dept. of Labor* as supporting authority.[1]

As indicated, supra, pp. 9-10, the facts of the *Bethlehem Steel* case bring it within the "twilight zone" of the *Davis* case, despite the significance attached to the latter case by the Massachusetts court. Accordingly, the decision of this court in the *Bethlehem Steel* case can only be deemed controlling authority for petitioner's position if, by affirming the judgment in *Moore's* case, this court intended thereby to approve, accept or adopt in toto, and by implication, the opinion of the Massachusetts court.

CONCLUSION

The decision of the California District Court of Appeal is in complete accord with the controlling decisions of this court. Petitioner, at the time his injuries were sustained, was employed on shipboard in work of a maritime character. His activities contributing to the repairs to the vessel had a direct relation to navigation and commerce. Under such circumstances the application of the California statute would work material prejudice to the characteristic features of the general maritime law and would be in derrogation of the exclusive admiralty jurisdiction.

The uniformity of the decisions of this court, that state workmen's compensation statutes may not be extended to workmen injured while engaged in ship repair work on a commissioned vessel in navigable waters clearly defines the jurisdiction and the act

[1] *Bethlehem Steel Co.* v. *Arthur J. Moore*, 335 U. S. 874, 69 S. Ct. 239, 93 L. Ed. 123, aff'g. 323 Mass. 462, 80 N. E. (2d) 478.

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under which such an employee may seek his remedy. There is no doubt as to which act applies. The facts and the law applicable thereto establish that petitioner's case does not fall into the "twilight zone" but is definitely within the exclusive federal jurisdiction.

It is respectfully submitted that unless this court intended to impliedly approve and adopt the reasoning of the Supreme Judicial Court of Massachusetts in *Moore's* case, in affirming the judgment in the *Bethlehem Steel* case, the decision of the California District Court of Appeal must be sustained.

For the reasons hereinbefore set forth, it is respectfully urged that the petition for writ of certiorari be denied.

Dated, San Francisco, California.
September 1, 1949.

Respectfully submitted,

EVERETT A. CORTEN
Attorney for Respondent
Industrial Accident Commission
of the State of California

T. GROEZINGER,
Of Counsel

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OCTOBER 24, 1949.*

Per Curiam Decisions.

No. 224. BASKIN *v.* INDUSTRIAL ACCIDENT COMMISSION ET AL. On petition for writ of certiorari to the District Court of Appeal, 1st Appellate District, of California. *Per Curiam:* The petition for writ of certiorari is granted. It appears that the decision of this Court in *Bethlehem Steel Co.* v. *Moores*, 335 U. S. 874, affirming the decision of the Supreme Judicial Court of Massachusetts, 323 Mass. 162, 80 N. E. 2d 478, was not available to the District Court of Appeal at the time of its consideration of this cause. The judgment is vacated and the cause remanded to the District Court of Appeal for reconsideration in the light of *Bethlehem Steel Co.* v. *Moores, supra,* and *Davis* v. *Department of Labor*, 317 U. S. 249. See *Minnesota* v. *National Tea Co.*, 309 U. S. 551; *State Tax Comm'n* v. *Van Cott*, 306 U. S. 511. *Franklin C. Stark* and *Samuel B. Horovitz* for petitioner. *Everett A. Corten* for the Industrial Accident Commission; and *Oliver Dibble* for the Kaiser Company et al., respondents. Reported below: 89 Cal. App. 2d 632, 201 P. 2d 549.

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*MR. JUSTICE DOUGLAS took no part in the consideration or decision of the cases in which judgments and orders were this day announced.

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